

A
S Y S T E M
OF THE
L A W S
OF THE
STATE of CONNECTICUT.

IN SIX BOOKS.

By ZEPHANIAH SWIFT.

VOLUME I.



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OF THE

L A W S

OF THE

STATE OF CONNECTICUT



BY NICHOLAS SWIFT

VOLUME I

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A SYSTEM of the LAWS
OF THE
STATE of CONNECTICUT.

INTRODUCTION.
Of Law and Government.

SECTION FIRST.

PRELIMINARY OBSERVATIONS.

EVERY citizen in the state, ought to acquire a knowledge of those laws, that govern his daily conduct, and secure the invaluable blessings of life, liberty and property. The best method to diffuse this knowledge thro all ranks, is to simplify, and systematize the laws. No country is favored with a more perspicuous code than the state of Connecticut ; yet in no country is it more arduous and difficult to obtain a systematic understanding of the law. The cause of this singular inconvenience merits particular investigation.

The common law of England is obligatory in this state by immemorial usage, and consent, so far as it corresponds with our circumstances and situation. As we have no treatise upon our laws, we are under the necessity of becoming acquainted with the English code for the purpose of understanding our own. The operation of the English common law, is ascertained by no general rule, and is bounded by no known line : it can be learned only from the decisions of our courts. A common law peculiar to ourselves, resulting from our local circumstances, has been established by the decision of our courts ; but has never been committed to writing. A difference in the form of the government, the manners of the people, and the circumstances of the country, furnished cases to which the com-

mon law could not be supposed to extend, and rendered necessary the introduction of statutes to supply the defect, and compleat the system of jurisprudence.

From this representation, it is easy to imagine the great labor, and difficulty of becoming thorough masters of our laws. The student must wander through the wide field of English jurisprudence, without a guide to direct him in the way. Having acquired much useless learning, in becoming acquainted with that voluminous code, he finds himself forever embarrassed with doubt and uncertainty, for want of some general rule, to determine what part of it has been approved of, and adopted by his own country. When he directs his enquiries to ascertain the common law, introduced by the decisions of our own courts, he can find it only in oral tradition, and the transient memory of judges and lawyers. The alphabetical arrangement of the statutes, renders it a laborious effort of the mind, to acquire a systematic knowledge of them by reading and study. This evidences that the only method of obtaining a knowledge of that science, which furnishes rules to which we are constantly bound to conform our conduct, is by a long attendance on court; and this points out the necessity and importance of a treatise, that contains a full account of the institutions of our country.

These considerations have induced the author of this work, to make the following methodical compilation, for the purpose of remedying these inconveniences, and unfolding the beautiful simplicity of our excellent system of jurisprudence. The plan he has adopted is to exhibit a compleat systematic view of our constitution and laws: to select and extract from the common law of England, that portion of it which has been received and approved from time immemorial, and has become valid and binding in this state: to collect, and arrange in proper order, those principles and doctrines, which have become law by the usage and practice of the people, and the decisions of courts: and with these to interweave and connect the positive regulations introduced by statute. This plan is intended to afford the student the satisfaction and delight of arranging his studies in proper method, of extending his mind at one view thro all the various branches of jurisprudence, of beholding the connection
and

and mutual dependence of all the parts, and of comprehending the beautiful order, and symmetry of the whole.

Not only the student may be assisted by a work of this kind, if well executed; but many other persons may derive essential advantage from it. No gentleman ought to consider his education compleated till he has gone through a course of studies upon the laws of his country. In the present state of this science, but few have leisure to acquire the knowledge of it, and fewer have fortunes sufficient to purchase the necessary books. This work is intended to furnish a man, who does not follow the profession, with sufficient knowledge of the law, for the purposes of contemplation, and amusement, and the ordinary business of life. There are many persons who are honored by the suffrages of their fellow-citizens, with seats in the legislature, who by reason of their employments, cannot be acquainted with our laws, in their present unwieldy voluminous state. Yet they are ill qualified to be legislators, without some knowledge of the fundamental principles of law, and the nature and extent of government. There are but few persons who are not frequently in the course of their lives called upon to decide upon the rights, and even upon the lives of their fellow-citizens as jurors. In this situation they are obliged to form judgments upon points of great importance and nicety, that require a considerable share of knowledge. This treatise is intended to furnish such persons with the information necessary for the faithful discharge of such important trusts.

But there is no order of men who can receive more benefit from such an undertaking as the present, than those who have the honor to hold commissions of the peace. Their extensive jurisdiction in criminal cases, and their power of trying matters of a civil nature, frequently render it necessary for them to determine questions of as much intricacy and nicety, as any that come before the highest courts. But few of them from their situation in life, can pay that attention to the study of the law, by which in its present state they can acquire the knowledge necessary to qualify them to fill their places with dignity and respectability. The consequence is, that their erroneous determinations render them contemptible, and their ignorance subjects them to the impositions of the artful and designing

ing. Unskilled in the mere formality of making entries of their proceedings and judgments, their records often furnish abundant matter of ridicule, when exposed to public view in writs of error brought to the superior court. To furnish justices of the peace with a plain treatise, by which they can with facility acquire the information requisite to qualify them to discharge the duties of their office with honor, and administer justice with impartiality, is the most important object of this work.

But it is not expected that those gentlemen who move in the higher ranks of judicature, or who are immediately conversant in the practice of the law, will derive any benefit from these disquisitions. Their benevolence and patriotism will induce them to encourage an undertaking that is calculated to disseminate useful knowledge, and augment the happiness of the people.

To every citizen of Connecticut, nothing can afford a more heart-felt delight than the consideration, that in no country on the globe, is there a more general diffusion of knowledge among all classes of people.—The universal attention paid to education, has laid the permanent foundation of a general taste for science and reading.—The various branches of literature by means of systematic treatises are within their reach: but the jurisprudence of the country is surrounded by such thick clouds of technical jargon and abstruse learning, that it is inaccessible to the mass of the people. To dissipate the darkness which has so long veiled this interesting science; and to disclose to the people a full view of those rules which govern their daily conduct, is the great object of this work. All that technical intricacy which has so long disfigured the science of jurisprudence, will be avoided, and our laws simplified and systematized, will be presented in a form intelligible to every capacity. A treatise calculated for this purpose is all that is now necessary to disseminate, as large a share of general and useful knowledge, as can be acquired by the body of the people. A republican form of government will then have the fairest chance to be put to the test of experiment. We shall be able to ascertain what portion of political happiness, a people are capable of attaining when they are well informed, and the quantity of civil liberty which is compatible with

with that energy in government which is necessary to preserve the peace and good order of the community. Those gentlemen who have a relish for literature, may pursue their enquiries respecting the laws of their country with as much facility and amusement, as they can the other branches of science, while a complete view and accurate delineation of our legal code, will render its superior excellence the object of general admiration and regard.

In accomplishing this work, the author has followed the practice of all writers on this subject. He has not scrupled to take advantage of the writings of all who have preceded him, and the plans and methods which they have adopted. The merit of the performance depends upon its being a faithful digest, and accurate compilation of principles already known and established, and not on new and original observations and discoveries. Far more delightful would it be to indulge the mind in wandering into the regions of fancy, and in exploring the fields of science, to select the most pleasing and splendid topics for discussion and illustration. But I must adopt the language of an eminent reporter; a "The nature of the undertaking precludes that sort of ambition, by which authors are so often animated, and my utmost aim will be attained, if I shall be found in any degree to have merited the humble praise of useful accuracy: *ubi ingenio non erat locus, curæ testimonium promeruisse contentus.*"

SECTION SECOND.

OF LAW IN GENERAL.

LAW, in the limited sense in which we are to consider it in the course of our disquisitions, is the rule of human conduct in a state of society. But in its most extended sense it may be defined to be a rule of action, applicable to animate and inanimate nature, and comprehending all the general principles of action, that are established in the system of the universe. To obtain a clear idea of the import of this term in its various and qualified meanings, we must survey that system of things from which laws originate, and in which they are established.

Philosophical

Philosophical discoveries have unfolded to mankind the magnificent and sublime idea, that universal space is adorned with innumerable systems of worlds—that all the stars like our sun, are suns to planetary systems—that the planets perform regular revolutions in their orbits, and are peopled by an infinite variety of inhabitants. These systems again perform one grand revolution around a common center, the center of Infinity, the throne of the Supreme Intelligence, the great first Cause—where his almighty power communicates life and motion to all nature, where his omniscient eye contemplates the ineffable glories of his works, and his boundless benevolence derives immeasurable delight, from diffusing infinite felicity to innumerable ranks of being; while the music of the spheres resounds a perpetual song to his praise.* This glorious representation of universal nature, exhibits the most exalted view of the transcendent excellence and boundless power of the Supreme Deity, whose almighty fiat called all worlds into existence, and impressed upon them those general and immutable laws, that will regulate their operation through the endless ages of eternity. The Supreme Being whose attributes are infinite power, wisdom and goodness, has formed this system upon the most perfect plan. He diffuses the greatest possible happiness, and distributes impartial justice to all intelligent and rational creatures—Tho our imperfect natures disqualify us, to reconcile all events that come within our knowledge, to the attributes of the Deity: yet if we could scan the universe, and discover the final result of all things, there is no doubt but that we should be delighted at the glorious manifestations of justice, and the liberal diffusion of felicity. The Deity having from all eternity, established the general laws that will operate with invariable certainty through all eternity, he is capable of foreseeing all events, that will take place, and of course, all things past, present, and to come, are forever in the view of his omniscient mind.

These

* Astronomers have discovered that the stars which are commonly supposed to be fixed, have a regular motion, which renders it probable, that they have a revolution round a common center. The precession of the equinoxes can better be accounted for on this hypothesis, than any other. The idea of the music of the spheres originated with Pythagoras, and probably was suggested by his singular theory of philosophy, that the first principles of things consisted in the harmony of numbers. Upon this idea, he has erected the most fanciful fabric of philosophy of any of the ancients. A contemplation of the revolution of all the planetary systems round a common center, accompanied by the music of the spheres, unfolds the most elevated and transcendent idea of the supreme character.

These general laws resulting from the original principles and fitness of things, and applicable to animate and inanimate matter, and rational and irrational beings, are denominated the laws of nature. The limited state of our faculties, renders it impossible for us to obtain a clear discovery of the infinite extent and universal operation of those laws. A full prospect of the glories of nature and a knowledge of the ultimate cause of things, must be hid from us, till our intellectual faculties are enlarged in some future state of existence. The astronomer has discovered the agency of gravitation in effecting the revolution of the heavenly bodies. The philosopher has investigated the laws of motion, the mechanical powers, the laws of optics, fluids, and electricity. The chemist has demonstrated that the composition and decomposition of material substances, are caused by the power of attraction, of cohesion, and repulsion. These, and many more which it is not my province to enumerate, constitute the laws of nature that respect the material world.

Man, who is the subject of these enquiries, is a compound being, consisting of matter and mind. The generation, organization, nutrition and existence of the material part, depend upon the same laws, as matter. The mind ennobles him with the highest privileges and excellencies, and renders him capable of sensation.—By means of the senses he obtains a knowledge of the beauties of nature with which he is surrounded—Endowed with reason, he is capable of thinking, and judging respecting the ideas communicated to him by his senses—Susceptible of the feelings of pleasure and pain, he is rendered an active being and impelled by a thousand motives, to shun the various scenes of misery, and pursue the fleeting objects of happiness. In this pursuit, his mind is under the influence and government of those motives which result from the established order of things; but as he feels that he has the power of doing as he pleases, he considers himself to be a free agent and responsible for his conduct. Invested with a conscience or moral sense, he is qualified to distinguish between right and wrong, and ascertain the boundaries between virtue and vice. This monitor enthroned in his heart, furnishes him with the transport of self approbation, when he pursues the path of virtue and points the

the dagger of horror and remorse to his soul, when he obeys the allurements of vice. Man as a moral agent, is subject to those moral laws which are co-existent with eternity, and which are calculated to produce the highest possible happiness in this stage of our existence. These laws are equally operative and obligatory upon the whole human race; and tho there may be some slight variations, occasioned by difference of climate and education; yet such is the agreement of mankind in respect to them, that they may be said to be general in their extent, and universal in their operation. Yet as man was not intended in the commencement of his existence, to be a perfect being, but to progress from stage to stage, towards perfection, till he should become qualified for complete felicity, and a full comprehension of the glories of his creator, we find that he is sometimes actuated by mischievous propensities and wicked desires, that impel him to a violation of the moral law, and the commission of injuries to his fellow-creatures. If some permanent principle were established, that coerced mankind to a perpetual observance of the moral law, they would be in a state of peace and safety, but the imperfect observance of it, has exposed them to every species of danger, insult, and injury, and has rendered necessary for their preservation, that social principle which is wisely implanted in the human mind.

Man when alone, is a feeble defenceless being—incapable of asserting his rights, and redressing his wrongs. The Deity has therefore instamped on his nature the love of his fellow men, invested him with social feelings, and impelled him by the strong principle of self-preservation, to enter into a state of society. The instant we contemplate man as a social being, we behold the germination of that principle that prompts him to adopt and observe those rules and regulations which are necessary to secure the rights of individuals, and preserve the peace and good order of society. Those rules constitute the civil law, and are the subject of these researches. A more complete and accurate definition will be given of law, as soon as we have considered civil society, and civil government.

Such is the extent of the globe, that it is impracticable to unite all mankind under one government. A number of distinct and independent

dependent communities have been erected. Their relation to each other is the same as that of individuals in a state of nature. Where a community has sustained an injury from another, it must be its own judge with respect to the recompence to be demanded, and must depend on its own resources to procure redress. In the intercourse of nations, by common and universal consent, certain general rules and principles have been adopted, that are founded on the law of nature, and denominated the laws of nations.—
 • This is defined to be the science of the law subsisting between nations or states, and of the obligations which flow from it. *b* Justinian says, “the law of nations is common to the whole human race.” The exigences and necessities of mankind, have induced all nations to constitute certain rules of right.

When man opens his eyes upon the wonderful, sublime and magnificent objects that surround him, he is convinced that there is some supreme intelligent power that called them into existence, and that governs universal nature. A consciousness of his own weakness and dependance, the pain and misery to which he is subjected, lead him to implore the mercy and favour of the invisible power by the fragrant incense of sacrifice, by the humble strains of adoration, or the pious supplications of a penitent heart and contrite spirit. Man is a religious being. In every stage of society, and in every country on the globe, this truth has been demonstrated. From the Tartar who roams through the wilds of Asia, and the Indian who traverses the woods of America, to the philosopher who with his telescope surveys the stellar worlds, or in his laboratory, explores the occult qualities of matter, the power of religion encreases, in proportion to the encrease of knowledge. Human laws, can neither create or annihilate it. Mankind will never cease to be religious, till they cease to exist. It would be a curious subject to investigate the wild systems of mythology, which have been adopted by nations guided by the light of nature, unaided by divine inspiration. But it is sufficient for our purpose to remark, that in this country we have the blessing of a religion, that while it opens the door of salvation, and guides to immortal felicity, is supported by such indubitable proof, that we must disregard human testimony,

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• Vattel, Law of Nations, 2. *b* Jus autem gentium omni humano generis commune est, nam usu exigente et humanis necessitatibus gentes humane jura quædam sibi constituerint. Just. Inst. L. 1. T. 2.

and reject the evidence on which all our knowledge of past transactions is grounded, if we doubt its truth, or deny its divinity. The christian religion derives the highest credibility from containing a system of morality, infinitely superior in point of excellence and purity, to the theology of Greece and Rome, and the philosophy of Plato and Cicero. From this religion, is derived the revealed or divine law, and the observation of it, is sanctioned by future rewards and punishments.

SECTION THIRD.

OF CIVIL SOCIETY.

WE have considered man as a sentient, rational, active, and moral being. We are now more especially to consider him in his social capacity. To obtain a thorough knowledge of this subject, it is necessary to view mankind when connected with each other, but independent of any government ; which political writers call a state of nature.

It cannot be expected that we can find any nation in a state of nature, tho some savage clans and tribes, are but little removed from it. But for the purposes of the present enquiry, it is immaterial whether this state be ideal, or actually existing. We can easily imagine what mankind would be, in such a state, and thence infer their rights and privileges.

In a state of nature, all men possess the inestimable privilege of freedom. They are equal in point of rank. They know no distinction, but what arises from superiority of bodily strength, and intellectual capacity. They are bound to yield obedience to the commands of no superior, and to conform their actions to the laws of no government. The moral law only, has any obligation upon them, and to this they owe the most perfect obedience. They have an indisputable right to do every act which they please, in the pursuit of their own happiness, that does not contravene the moral law, nor injure any of their fellow creatures. The rights of personal security, personal liberty, and private property, they are entitled

entitled to in their fullest extent. When any person sustains an injury, he appeals to no tribunal for redress, he is the sole judge of the injury, tho his own case ; his own arm avenges the wrong, and chastises the offender. If mankind were under the perpetual influence, and invariable direction of the moral law, how happy would their situation be in a state of nature : there would be no necessity of the interposition of human laws. But while conscience dictates to them to pursue the paths of virtue, and warns them against the practice of vice, there are many individuals who are actuated by certain propensities, to wrong their fellow-men, and infringe the rules of morality. To check, restrain and punish this injustice, every individual is left to the strength of his arm, and the powers of his mind. So great is the difference among mankind in this respect, that the conflict is very unfair and unequal. The weak will always fall a prey to the strong ; the cause of justice will be disregarded, the powerful will triumph in the practice of mischief, and injustice,—the weak must suffer a constant repetition of injuries without a possibility of redress. This points out the miserable condition of man in a state of nature, and we may rationally expect to find him endowed with some principle to supply the defect.

Why immutable laws were not instamped upon the mind of man, that should certainly direct him to a course of conduct productive of the greatest possible happiness, is a mystery far beyond human comprehension. It is however probable, that in the system of nature, and in the eternal plan conceived in the divine mind, for the display of his glory, it became necessary to create such an order of beings as man, to compleat that infinite variety that distinguishes the works of creation. He is endowed with all the principles that are necessary to constitute his character. While he applauds the practice of virtue, we find that the unguarded impulse of passion, the prospect of temporary pleasure, or the inclination of a wicked heart, may lead him to do wrong to his fellow creatures, and disturb their peace and repose. But lest this perpetual warfare should put an end to the human race, they are inspired with a love for each other, and are endowed with principles, that lead to unite in society for mutual protection, and defence. The mutuality of affection between individuals, the fear of danger, the incapacity

incapacity of defence, and the wants which they cannot supply, in a state of nature, induce them to associate together, and may be considered as the basis of civil society.

A state of society when contrasted to a state of nature, must not be considered as merely artificial, and therefore unnatural. The truth is, that the social state is perfectly congenial to the feelings of the human heart. Man is a gregarious animal, and the principles of his nature lead him to the formation of social connexions.

The act of uniting in society, is called the original compact, or social contract, and is supposed to be a voluntary agreement between individuals, by which they form the constitution of government, and secure the enjoyment of political liberty, and the pursuit of private happiness. Governments that have been established by force do not admit of this idea: but such is the origin and foundation of all free governments, tho' generally it is impossible to find any records of the formation of the social compact. In America however, many instances of that nature have taken place. At the dissolution of our connexion with Great-Britain, tho' we could not be literally said, to be in a state of nature, yet the states which had been directly dependent on the British crown, were so in a political point of view, and they proceeded to enter into social compacts, and adopted constitutions for their government. The constitution of the United States, is the most illustrious example of a government founded on the voluntary contract of the people, that the page of history has ever recorded.

Mankind when they enter into a state of society, resign to the community a certain portion of their natural liberty, to acquire civil liberty. They resign a part of their natural rights, to acquire social rights. Natural liberty consists in a man's having the power to do whatever he pleases, uncontrouled by any superior, and regarding only the moral law. Civil liberty, consists in a person's having the power to do whatever he pleases, consistent with the laws to which he has voluntarily subjected himself.—The object of a man in surrendering to the community any portion of his natural liberty, is to obtain compleat protection and security for political liberty. He does not therefore consent to the
 imposition

imposition of any other restraint upon his conduct by the government, than what is necessary to secure and preserve his social rights.

We may therefore establish it as a maxim in legislation, that the rule to be adopted in enacting laws, must be, to restrain no acts but those which tend to the injury of individuals and the dissolution of government. Every law that deviates from this rule, is arbitrary and unjust, and reduces the people to political slavery. Every government that adopts this rule secures to the subjects political liberty.

Every citizen owes obedience to the laws of the state, and is entitled to protection and security in his life, liberty, and property. The duties of protection and allegiance, are reciprocal.

Where civil government is once formed by the operation of natural principles, we find its support is derived from the same source. Man will as soon put an end to his existence, as withdraw himself from society, or cease to maintain it. The all-wise creator, has given mankind feelings that lead them to perform the course of conduct which he has designed. These principles result from the necessary constitution of things. Man when alone is feeble and defenceless, incapable of protecting and defending himself. He is constantly alarmed with fears of danger, and surrounded with wants which he cannot supply. But when individuals unite together, they become capable of mutual protection, and defence, and of supplying all their wants. From the combined and collected strength of the whole community, each individual derives a security, which he cannot obtain when alone and separate. The strongest of all motives, therefore, self interest and self preservation, co-operate to strengthen the bands of society. The happiness of men depend upon their connexion and union with their fellow creatures. Man banished from society is a miserable, melancholy being. In the company and conversation of his friends, he obtains all the pleasure that renders life worth enjoying. We must eradicate from the human heart, the desire of happiness before man will cease to adhere to the community.

Political writers have generally entertained an idea, that men when they enter into a state of society, sacrifice, or give up to the community

community some portion of natural rights, to acquire protection and security for the remainder. A late writer on government whose talents command our respect, and whose exertions to communicate just sentiments respecting government, merit our approbation, has pointed out the error of this general proposition, and has advanced the principle, *a* "that the rights of man are relative to his social nature, and that they exist only in a coincidence with the rights of the whole, in a well ordered state of society, and civil government: *b* that society in the administration of right, grants nothing to any of its members, and that every man is a proprietor, and draws on the capital as matter of right." His opinion seems to be, that man makes no sacrifice when he enters into the social state, and that it is congenial to his nature.

The position that when men enter into the social state, they give up some portion of natural right, to acquire security for the remainder, is manifestly erroneous. To suppose that men by uniting in society, only obtain security for the rights they have reserved, is contrary to fact. To say that our natural and our social rights are the same, perhaps, is not perfectly correct. Some confusion probably has arisen with respect to this subject, from not annexing accurate ideas to the words, which have been used. To contrast the social state, to the natural state, as tho' the former was artificial, and the latter natural, is contrary to truth. No principle of human conduct, is more perfectly natural than that which prompts mankind to associate together for mutual benefit. The words social, and natural, are not therefore to be considered as designating opposite states, in which mankind are placed. They are only to be considered as two distinct states in which they may be contemplated to ascertain the rights and character of man.—I doubt whether a state of nature ever did, or can exist; but I can imagine such a state, and thence infer the advantages derived from a union in society.

In a natural state, the moral law would be the only rule of conduct. Admitting that mankind would pay a compleat regard to that law, what would be the consequence? It is easy to observe that they would not remain like some savage tribes, in a rude uncivilized

a *Chapman's principles of government*, 77. *b* *Ibid.* 112.

civilized state : nor would they live alone unconnected with each other. They would build towns and cities, improve in agriculture, manufactures, and commerce, and obtain all the pleasures of society. There would be no necessity of a code of laws to regulate their conduct, or of a government to carry them into execution. They would be able to attain under the invariable influence and direction of the moral law, all that happiness which could be attained in a well regulated government. Human industry, unshackled by laws, might be exerted in every direction, and extended to the highest point of improvement. There would be no restraint upon the conduct of man, but the moral law.

But supposing, that men would not pay a perfect obedience to the moral law, and yet did not carry their injustice to an extreme, which required the strength of government to suppress it. The consequence would be, that whenever an individual sustained an injury from the misconduct of another, he would have a right to be his own judge, to ascertain the recompence to which he is entitled, and the strength of his own arm must carry his decree into execution : he would be bound however to govern his judgment by the principles of moral justice.

But on actual experiment, it is found that men will not regard the dictates of the moral law, and that individual strength is insufficient to repel the violence of injustice. It is therefore impracticable for them to exist in a state of nature, and they are under the necessity of combining together for mutual protection and defence. This is the operation of a natural principle. But when men have arrived to the social state, when they have adopted a civil government, how are their rights varied from what they are in the natural state ? Every individual gives up the right of judging in his own case, and avenging his own wrong, to the community. In this respect, natural right is varied. In consequence of this he acquires from the community, a right that his claim for the reparation of any injury, he has sustained, shall be ascertained by known and just principles, and that the whole strength of the community shall be exerted to do him justice. This is a right which he had not in a state of nature. It is a right which he acquires as a member

ber of society. In a state of nature, no man is bound to aid and assist another in the prosecution of justice, or the defence of his rights unless he pleases. But in the state of society, every individual becomes obliged to exert his strength, in obedience to the order of the community, for the benefit of an individual, or for the preservation of public tranquility.

Every member of the society submits to numerous restraints upon his conduct, which are not required by the moral law, or in the natural state, for the purpose of vesting in the hands of government, the power of furnishing him complete security and protection.— We submit to many formalities respecting contracts, which are the offspring of positive, and not of natural law, to render our property secure. We consent to be restrained from doing many acts which are innocent in themselves, and to be obliged to do many acts which the natural state does not require, to obtain complete protection for the rights we mean to enjoy. In consequence of this, we acquire many rights, and advantages of a civil nature, which could not be obtained in the natural state. Hence it is evident that there is a distinction between natural and civil rights, as they may be called more properly, than social, because a person may enjoy social rights, in what is properly called a state of nature. Natural and civil rights cannot be enjoyed at the same time. We must give up the one to attain the other. But the natural rights which we sacrifice, are of but very little value, when compared with the civil rights we acquire in a free and well regulated government. Indeed they are of little value, because they are difficult to be exerted, but the civil rights are of immense value, and are capable of being realized.

This leads us to a correction of that opinion which has been maintained by so many philosophers, that men resign part of their natural rights, to obtain security for the remainder, by substituting the proposition that men give up to the community, a part of their natural rights to acquire civil rights. From this same principle it follows, that the opinion that society in the administration of right, grants nothing to any of its members, is not well founded. For in the civil state, which is deemed the same as the social state, by the administration

administration of the government, the members do acquire certain positive rights, which they can enjoy only in a civil state, and which are therefore to be considered as the gift and the offspring of social institutions. It is in virtue of his being a member of the society, that a man is a proprietor, and has a right to draw on the capital, and not in virtue of any natural right.

Men at their birth are all vested with equal rights, but are endowed with unequal powers. There is a great difference between their intellectual, as well as corporeal faculties, which is the origin of the inequality of mankind. The man who has superior strength of body, or powers of mind, must take a correspondent rank in society. The man who possesses uncommon talents for accumulating property, will grow rich, while the opposite character, with equal advantages will remain poor. Those who are blest with the powers of eloquence, or talents to render them distinguished in the various branches of literature, will acquire a fame that cannot be reached by men of moderate capacity. Hence in the nature of man, we find the foundation of that difference of condition, which is every where established. There is a gradation in human powers from the highest to the lowest, which has produced a correspondent gradation in the ranks of society. But whether men possess the greatest, or the smallest talents, they have equal claims to protection, and security in their exertions, and acquisitions.

It is idle to lay it down as a general proposition that all men are born equal. It is contrary to the truth of the fact, and the design of the creator. The difference of genius by which they are qualified for different occupations, is essential to the existence, and conformable to the nature of man. But the real misfortune is, that this natural inequality among mankind, has been directed to establish an artificial inequality, which has been the source of serious evils, and complicated inconveniences. The establishment of hereditary honors and privileged orders among the nations of Europe, and the division of the Hindoos, into four tribes, or casts in Asia, by which birth, and not superior accomplishments, has placed certain persons in the highest ranks in society, to the exclusion of those who possessed the requisite talents, may be considered as a violation of

natural right. It is in a country where such artificial distinctions of rank are established, that people are to complain of inequality, and attempt a reform. But in a country where the laws know no distinction of rank, and furnish equal security to the exertions of the various extent of human powers, we have no occasion to trouble ourselves with idle speculations respecting equality. We shall find that the operation of these equal laws will be the establishment of a gradation of ranks, and a variety of conditions, essential to the existence of society, and productive of the greatest happiness.

An attempt to reduce all men to a state of equality would be a violation of the laws of nature, and such a project could never be carried into effect. The man who possessing feeble powers of mind, but great strength of body, acquires by constant labour the means of subsistence, can find no fault that a man possessing great strength of intellect, with feeble powers of body, should acquire by his own exertions immense wealth; for such is the law of our being, and such will be the result of things, where society grants equal security to the exertions of different capacities. But this is counterbalanced by the consideration that human happiness is not unequal in proportion to the inequality of condition. Let not those then who are placed in what is deemed the unfortunate grade of poverty, repine at their fate, or attempt to subvert the order of things, for in the humblest rank to which men are assigned by providence, this consideration ought to silence every murmur, that human felicity is not proportioned to dignity of rank, or abundance of wealth, but is distributed with an equal tho sparing hand to every grade, and that there is as much genuine bliss to be found in the lowly cottages of the poor, as in the palaces of princes, or on the thrones of kings.

SECTION FOURTH.

OF CIVIL GOVERNMENT.

TO understand the nature of laws, we must know the principles and forms of government. Upon a subject so extensive and
important

important, it is difficult to condense our observations into proper limits. In an investigation so sublime and pleasing, it is difficult to set proper bounds to our enquiries. In an elementary treatise upon jurisprudence, we must reduce our remarks to a narrow compass.

Mankind, when they enter into the social state, and form the original compact, adopt some form of government.

There are four simple, uncompounded forms of government, to which all others are reducible. The first is where the supreme sovereign power is vested in the people, who collectively assemble for the purposes of legislation and government : this is called a democracy. The second is where the sovereignty is lodged in the hands of a council or senate, consisting of the principal persons of the state, either in respect of nobility, capacity, or probity : this is called an aristocracy. The third form is where the whole power is vested in the hands of one person, which is called a monarchy. The fourth is a government by representation, or a representative republic, where the sovereignty is lodged in the hands of certain representatives, elected by the people, and to whom they delegate certain constitutional powers to promote the public welfare.

These four different forms may be combined and modelled into a thousand different governments.

Perhaps a pure and unmixed democracy has never existed in any age or country. Those which have the nearest resemblance to it, will be found to have some tincture of aristocracy. The Areopagus of Athens, and the Senate of Rome, were a constant and powerful check upon the democracy. It may generally be remarked, that the more a government resembles a pure democracy, the more they abound with disorder and confusion. That the people will frequently commit the most astonishing acts of cruelty and oppression, that they have all the relish for war, and ambition for conquest, that distinguish monarchs, and that the consequence of their violence and contention, is the establishment of a despotic government. These facts are most fully verified by the stories of the Grecian and Roman republics.

Many pure aristocracies have existed, such as Venice, the United

Netherlands, and many of the Swiss Cantons. Where certain well-calculated checks have been instituted, the community have sometimes enjoyed a tolerable share of political happiness, but in general the happiness of the many has been sacrificed to the happiness of the few.

Monarchies may be absolute, or limited. Absolute monarchies, where the will of the prince is the supreme law, and the lives and estates of his subjects are at his disposal, have existed in some of the oriental countries: but the monarchies of Europe are limited by certain forms of proceeding, and certain long established customs, which controul the will of the monarch, and temper the severity of the government.

Of mixed governments, Sparta and Great-Britain constitute the most illustrious examples. Sparta may be considered as a compound of monarchy, aristocracy and democracy. There were two kings, a senate, and an assembly of the people. In Great-Britain there is a king, who has an hereditary right to the crown; a house of lords, who are hereditary nobles; but the house of commons being the representatives of the people, cannot be considered as resembling a democracy, but a representative republic. This circumstance constitutes the superior excellence of this government. They have combined the advantages of monarchy and aristocracy, and for the rashness and instability of democracy, they have substituted the advantages of a branch of the government by representation.

A representative republic may be constituted in different manners. The sovereign authority may be collected in one center, or a single house of representatives, according to the French theories of government, or it may be vested in a legislature consisting of three distinct branches, like the constitution of the United States, and several of the state governments. The United States have exhibited the first fair example of a representative republic, with a legislature, composed of three branches. It appears the best in theory of any government, that has been instituted, but time alone can determine how well it is calculated for energy and duration. The government of the United States is singular in this respect, that there are state legislatures to regulate the interior local concerns of the
several

several states, while the federal legislature regulates the general concerns of the republic. The blending of these different governments, for different purposes, seems to be well calculated for an extensive country, and if the line of demarcation between them, can be so accurately ascertained, as to prevent any clashing of jurisdiction, it will promote the happiness of the people, and strengthen the hands of the government.

Nothing can be more erroneous than the opinion that the government of the United States is a democracy. It has not a single feature of that form of government. The people have no power but that of electing the representatives, which they have not in a democracy ; they can not do a single act in framing the laws or administering the government, any more than they can in the most despotic government on the globe. Some have called it a representative democracy ; but this is a contradiction in terms, and as improper as to call it a democratic aristocracy ; for democracy signifies a government by the people themselves, and a representative government is where the government is not by the people, but by representatives for that purpose elected by the people, and to whom they have delegated the power of administering the government. Let us only consider our government in this light, and many groundless prejudices will be removed. The people are invested with the right of electing their rulers, which is no part of government ; and the administration of the government is in the hands of representatives of different descriptions elected by the people. Here are neither democracy, aristocracy or monarchy. It is a pure original form of government.

An historical view of the progressive, but gradual improvement of government, from the earliest to the present time, would be a subject of the noblest speculation—But our plan confines us to the utmost brevity.

The ancients were far behind the moderns in their improvement in the profound sciences of government and policy. They had no idea of securing the rights of the different orders in society, and moderating the rashness and impetuosity of a democracy, by a fair

fair and equal representation of the people. ^a Tho they adopted a variety of expedients to check the power of the different orders, yet they never discovered the true principles of balancing them by an equal distribution of the legislative power among three branches, and separating it from the executive and judiciary.

^b In the heroic ages of Greece, when the people were in a pastoral state, they adopted forms of government of a democratic nature; investing the military command in a chief, in times of war. As they progressed in civilization, and agriculture, their chiefs gradually extended their power, till the people resumed their rights and established in the little territory of Greece, a number of republics, of an aristocratic, and democratic nature. In all, an imperfect effort was made, to balance the contending interest of the nobles and the people, and the institutions of Lycurgus, and Solon, have immortalized their names as legislators in the page of history. Had that people, who have exhibited some of the boldest efforts of genius, and the sublimest flights of imagination, hit upon the plan of a representation of the people, and a division of the legislature into three branches, they had not been a prey to anarchy and intestine wars, while their governments continued; nor had their country now been subjected to the deepest wretchedness and misery, under the iron hand of Turkish despotism.

The Greeks had no just idea of preserving the independence of the several states and kingdoms of the world, by maintaining the balance of power between the whole. The Amphyctionic council was but a flimsy expedient to preserve their liberties against intestine commotion and foreign invasion. They soon acknowledged the superiority of the Macedonian power, and suffered Alexander the great, to conquer a principal part of the civilized world, without any attempt to form a combination to check an enterprise so dangerous to all the nations of the earth. His premature death prevented him from securing by the regulations of peace, the advantages he had acquired by the victory of his arms, ^c and af-

ter

^a Adam's defence of the American constitution, Vol. I. I am bound to acknowledge that I am indebted to this work for many ideas and observations. The eminent author has not only exhibited a thorough and accurate knowledge of his subject; but he has detailed a beautiful theory, illustrated by the experience of past ages, that may be considered as a perfect standard in the science of government.

^b Gillies history of Greece, Vol. I. ^c Roll. Anc. Hist.

ter a long series of bloody wars, his conquests were divided by three of his captains into the despotic kingdoms of Syria, Egypt, and Macedon. All kingdoms established by a leader at the head of his army, will partake of that military despotism which is necessary for the discipline of soldiers.

During this time, the republic of Rome was extending its conquests over the neighbouring nations, in a manner of which history furnishes no other example. In the first dawn of the Roman history, we find the people under the obedience of kings, whose abuse of power, soon provoked them to reclaim their natural rights, and establish a republican form of government. Tho the want of a balance of power, between the senate and the people, opened the door for perpetual discord and contention, yet their military spirit, and their ambition of empire, led them to achieve the conquest of all the civilized nations of the earth, and the potent kingdoms founded by the successors of Alexander, dwindled into provinces of the Roman empire. But the feeble and jarring powers of the government, were insufficient to guard, protect, and defend a state of such vast extent. Had the powers of the senate and people been equipoised, and all the provinces fairly and equally represented, perhaps the Roman eagle would at this time have spread its wings over all the habitable countries on the globe. It is no wonder, that the exalted virtue and sublime eloquence of Cicero could not stem the torrent of universal corruption, and restrain the licentiousness of a populace, who in the wealthiest city in the world, had in a collective body the supreme command of an empire. Rome was ripe for a revolution, when Julius Cesar, the greatest hero of antiquity, who by a ten years series of victories, had conquered the fierce nations of Gaul, descended from the Alps, passed the Rubicon, and on the plains of Pharsalia, triumphed over the arms of Pompey, and trampled on the liberties of his country. But a Roman was found, who by the boldest exertion of patriotism dared assert the cause of liberty, and punish the usurpation of the tyrant. In the capitol, in an assembly of the senate, the dagger of Brutus avenged the insult done to his country; but the death of Cesar neither expiated his crime, or restored the liberty of Rome. It opened anew the sources of discord, and after oceans of Roman blood

blood were shed, Augustus laid the permanent foundation of a despotism, that enabled his successors to insult the dignity of the world, and sport with misery of the human race.

In the fifth century, the eastern and western divisions of the Roman empire, held in servile subjection, the fairest portion, and best cultivated part of Europe, Asia, and Africa. The long, constant, and uniform operation of arbitrary power, and the blind submission to the will of a sovereign, enervated the powers of genius, and checked the flights of imagination. The matchless eloquence of a Cicero, no more resounded in the capitol, to defend the rights of man. The harmonious numbers of a Virgil and a Horace, no longer polished the manners, and improved the virtues of the people. The laurel of fame, and the tribute of applause, were bestowed on the vile sycophants, who composed the most hyperbolical strains of adulation. The feeble efforts of genius demonstrated the shackles that were rivetted on the human mind. The world was prepared for a revolution.

At this period, the uncivilized nations issued from the forests of Germany, subverted the Western empire, and produced the most important revolution recorded in the annals of history. They changed the face of the earth, new manners and customs were introduced, new forms of government established, and new codes of law promulgated. From this revolution, is derived the noble and romantic heroism of chivalry, which produced so great a difference of manners, between ancient and modern times; and the feudal system which led the way to the discovery of representation in government, and the balancing the different orders by three branches in the legislature. A revolution of such extensive consequence, has long been a subject of speculation to the literary world, and can never be too much contemplated or too fully investigated.

All unpolished nations, in that simple state of society which is denominated pastoral, are led by the dictates of nature, to adopt similar governments. Survey mankind through every period of history, and extend the eye to every nation on the globe, the Grecians, the Romans, the Germans, and the Tartars, and this truth will be fully demonstrated.

The

Gibbon's history Roman Empire. f Robertson's hist. Charles, V. vol. 1. Hume's hist. Eng. vol. vi. Gibbon's hist. Rom. Emp. Millar on ranks in Society. Millar's hist. view Eng. Gov. Sullivan's Lectures.

The manners of the Germans, several centuries before their invasion of the Roman empire, were described by the masterly pen of Tacitus, who deserves the title of the philosophical historian.—The leading feature of their government, was democracy. In an assembly of the freemen, the supreme power was lodged. They elected a chief to preside in their national councils, and conduct their military enterprizes. This assembly of the freemen was continued after they had made permanent settlements in the conquered countries, and established on the ruins of despotism, the outlines of free constitutions. But I must confine my enquiries to that kingdom, which alone from the confusion of the feudal system, extracted a form of government, that has been the admiration of mankind.

In the middle of the fifth century, the Romans incapable of supporting their tottering empire, against the violent shock of the invaders, left the inhabitants of the southern part of the island of Great-Britain, enervated and corrupted by the arts of peace, and the shackles of slavery, a feeble and defenceless prey, to the fierce and warlike inhabitants of Caledonia. Upon the invitation of Vortigern, the British king; the Saxons left the wilds of Germany, and came to their relief. The Picts, and Scots fled before their victorious arms: but the Britons experienced the same treatment from their allies, which they dreaded from their foes. After a bloody struggle, seven Saxon chiefs erected their thrones. In the eighth century, the superior valour and wisdom of Egbert, united the country under the power of the Anglo-Saxons, from whom the English, and England derive their name. The Saxon conquerors introduced their own institutions. The king was the chief, and the supreme power was vested in the national council, called the Wittana gemote, consisting of all the freemen of the nation. In the distribution of the lands, the immediate retainers of the king held by feudal tenure, and the freemen by an allodial title.

When England submitted to another conqueror, and William the Norman, by the decisive victory of Hastings, gained an undisputed title to the crown, he introduced into England the feudal tenures, with the rigorous and oppressive consequences annexed to them on the continent, where all the allodial estates had been converted in-

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to

g De moribus German.

g Millar's historical View Eng. Gov.

to feuds. The allodial proprietors surrendered their lands, and became vassals of the king. The Wittana gemote, assumed the name of parliament, and was composed of feudal barons. The jealous nobles, firmly resisted the efforts of the Norman kings to establish an arbitrary sway, and on the plains of Rummy-Mead, extorted from John, the *Great Charter* which secured the independence of the parliament, and the liberties of the nation. In the progressive improvement of the state, and from the more equal distribution of property, the persons who had a right to a seat in the great council became numerous, and the poorer class were unwilling to bear the expense of attendance. The kings were desirous that the lower order should attend the parliament, for the purpose of counterbalancing the power of the great and wealthy barons.—Hence originated the election of knights of the shire and burgesses, to represent the counties and towns, by which their privileges were secured, and the expensive attendance of the whole was saved.

The difference of rank between the nobles, and the representatives, and the different rights to their seats, naturally led them to meet in different apartments, and form separate deliberations and determinations. The king as the chief of the nation, naturally assumed the executive power: the judges by their uniform decisions, established a permanent system of common law, which drew the business of that nature from the parliament, to their tribunals, and enabled them to assume a regular jurisdiction over all the controversies of the people.

In this accidental manner originated, the principle of representation, the balancing the orders of the people, by three branches in the legislature, and the separation of the executive, legislative and judicative powers. The most capital improvements that ever had been made in government.

The improvements of the English nation, in the science of government, were by our ancestors at the time of their emigration transplanted to America. The greater part of that country which now composes the United States, was settled by private adventurers, without the aid of the crown of England. On their arrival in the wilderness, surrounded by ferocious tribes of savages, and exposed

to the horrors of hunger and cold ; they reverted to a state of nature, and had the right of erecting such form of government as they pleased. They were naturally led to copy as nearly as difference of situation and manners would admit, the institutions of the country from whence they originated. A governor, council, and representatives, bear some resemblance to the king, lords, and commons of the English parliament. As they acknowledged allegiance to the British crown, no person could claim the pre-eminence of royalty. As none of the nobility had any inducement to exchange the luxuries of a cultivated country, for the enjoyment of religious liberty in a wilderness ; there were none to claim the privileges of noble blood. Equal in point of rank, they were naturally led to fill every department with members elected from themselves. By this accident, it was reserved for America to give the last improvement to the form of government, by introducing the election of every branch from the body of the people. The governor, council, and representatives, raised to office by the suffrages of their equals, were vested with the supreme power of the state : acknowledging the authority of the British crown, they presented these free constitutions to the king, to be secured by the sanction of a royal charter. Their resemblance to the English constitution, and the contempt and indifference with which the little republics of America were beheld in England, induced the king to grant them charters, containing such extensive rights and privileges, as enabled them to resist the tyranny of his successors, and effect a revolution, which has fixed a new era in the history of government, and policy.

The act of independence passed by Congress on the ever memorable 4th of July, 1776, dissolved the political connexion between this country, and Great-Britain, and furnished the people with an opportunity of reaping the full advantages that naturally flow from the spirit and freedom of their governments. As soon as peace had healed the wounds of the country, bleeding from an eight years struggle in the acquisition of sovereignty, and given the people an opportunity to reflect upon their situation, the fruits of their superior knowledge in the science of policy became conspicuous. Convinced of the insufficiency of the confederation, to render them a rich, a happy, and respectable nation, they exhibited to the world

an unparalleled example of public spirit, in adopting the present constitution of the United States. In this constitution the principles already discovered in America, are displayed in their full extent and meridian splendor. We here behold all the ingredients, that constitute a good government. The balance of power maintained by three branches of the legislature. A separation of the legislative, executive and judicative powers, so as to operate as checks upon each other. A qualified negative on the legislature vested in the executive, sufficient to guard against any encroachment. Every branch of the legislature, and the supreme executive magistrate, ultimately elected by the people. The judiciary rendered independent. The representatives sufficiently numerous, and the empire properly districted, so as to give them an opportunity to be well acquainted with the interest of every part of the community. Their elections sufficiently frequent to give their constituents an effectual restraint upon them. The people are possessed of all the power, that can safely be lodged in their hands. The republics of Athens and Rome, have demonstrated the danger of trusting the supreme power in large popular assemblies. The rights of electing the legislature and the supreme executive, may safely be vested in them in their collective capacity, and this will be an eternal barrier to despotism.

In a country where the three ranks of a king, an hereditary nobility, and the people, were distinguished, as in England, and the object was to secure them all in their different rights, the English constitution was the best that human wisdom could devise: in a country, like America, where there is no distinction of ranks, the present constitution is the best that could be adopted. The great superiority of this constitution to the British, arises from the circumstance that tho the supreme executive magistrate and senate are elective, yet their mode of election is so contrived, as to afford far more security and stability than result from the ensigns and trappings of hereditary royalty and nobility.

An hereditary monarchy is certainly preferable to an elective, because it prevents disputes about the succession. This constitution
appoints

I speak of the general principles of the constitution. I do not mean to approve of the inequality of representation, and the test and corporation acts. Those disgraceful reliques of an intolerant spirit.

appoints a successor to the president, in case of a demise in office, so that there never can be an interregnum, nor a disputed succession. In the supreme executive and the senate, there is no danger that the right of birth will place in those offices persons who have nothing to boast of, but the merit and glory of their ancestors.

In a country where the laws and the manners admit of but one order of citizens, and where the people instead of meeting in a body are governed by representation, there may be a question respecting the propriety and the necessity of a senate in the legislature. As the constitution is framed for a number of confederated states, there is a peculiar propriety in a senate, for the purpose of maintaining the independence, and dignity of the several states. But in all countries where there is no distinction of ranks, several reasons will forever exist, that will justify the establishment of a senate, for one branch of the legislature.

* In every age and nation, the natural inequality of mankind, arising from superiority of ability and virtue, has laid the foundation of a natural aristocracy. In a legislature composed of a single branch, the personal influence attendant on genius, merit, and learning, might enable the possessors to form combinations, and execute plans, dangerous to the liberties of the people. Remove them to a senate, (and such will be the characters of which senates will always be composed) and they lose the opportunity of inflaming popular assemblies, by the splendor of eloquence, and of persuading them by the arts of intrigue, to adopt rash and ruinous measures. This promotion will enhance their personal dignity, and lessen their popular influence. A seat in the senate, is a proper reward for the services of those persons who are by nature endowed with talents and dispositions to do good to mankind. Such an object may divert the ardent pursuits of ambition, from schemes less praise worthy and honorable.—But there is another reason far more weighty and important.

In every legislature, there is a perpetual propensity to enact too many laws, to attempt to regulate mankind, respecting matters that ought to be left to their own operation; different branches, will lessen the facility of making laws, and check the rage of legislation

* Adams's defence of American Constitution.

lation so injurious to the community. A sudden whim or popular clamor, may impel one branch to enact impolitic laws, which the other not being under the same influence, will reject. In two branches, where each have the power of originating, canvassing, and passing the acts, there will be much more deliberation, coolness, and caution, than in a single body. Each branch, will watch with a narrow eye the conduct of the other, and will examine every bill with the utmost care, and criticise it with the utmost scrupulosity: they will in this manner discover defects, point out inconveniences, and suggest amendments, that would pass unnoticed, in the hasty deliberation of a single body. Tho the government be by representation, which avoids many of the inconveniences of a democracy, yet if the representatives should be as numerous as public safety may require, it is possible that on some occasions, they may be impressed by popular impulse and clamor, and be led to all the excesses of democratic violence,—or if the representation be so small as to avoid that danger, then they may run into the opposite extreme of aristocracy. But where there is a senate, they will be able to controul the spirit of popular caprice, while the representatives will counteract any aristocratic influence in the senate.

If all the members of a legislature are liable to frequent changes, they will never have that firmness, energy, and experience, which are necessary for the public security. If all the members of the legislature, are permitted to continue in office for any long period, there is a probability of their being under a temptation, to encroach upon the rights of the people. To guard against these inconveniences, there ought to be two branches in the legislature: let the house of representatives be frequently elected, and the power of the people over them, will be sufficient to restrain them from any acts of oppression, and they will effectually check the senate. Let the senate be secure in their seats for a considerable time, and they will acquire sufficient firmness and energy, to counteract the rashness and imprudence of a house of representatives, and defeat the clamor and violence of the people. Secure in their places, they will be able to steer the ship with a steady helm, through the most boisterous storms, and wait till the return of a calm, for the approbation of their conduct.

Many

Many have indulged their fancies in attempting to discover a resemblance between the constitution of the United States, and the British constitution. They consider the president to answer to the king, the senate to the lords, and the representatives to the commons. The house of representatives being elected by the people, resembles the house of commons, but as the other branches are elective in this country, and hereditary in Great-Britain, the resemblance is very remote, and the principles of the government widely different. Our Government is original in its construction, and founded on a new basis. We have steered clear of the inconveniences of monarchy, aristocracy, and democracy. We have a established a representative republic. We have imitated the British nation only in the adoption of the excellent principle of balancing the legislature, by distributing it into three branches.

The principle upon which the government of the United States is founded, is the interest and the happiness of the people. It is an appeal to their good sense, and it must depend for its support, upon a serious conviction of the necessity of subordination to government, for the security of their rights and privileges. It becomes therefore necessary to communicate to the people, just ideas respecting their own interest and welfare, and to impress and inculcate upon their minds, those principles which are essential to the preservation of civil liberty and good government.

A slight observation of human nature, will demonstrate that the remarks which *† Tacitus*, and *‡ Voltaire* have made respecting the Romans, and the English, are applicable to all nations. *That they can neither bear total servitude, or total liberty.* Another observation is equally evident, that man is extremely unwilling to submit to the exercise of authority over himself, but is very willing to exercise it over others. Kings are not the only persons that are pleased with the exercise of sovereign power. The people in some instances have manifested a keen relish for this business. The populace of Rome during the period of the republic, appeared to glow with all the ambition of conquest, and to be delighted in tyrannising over all the nations of the world. They wished to be free

† Nec totam servitutem, nec totam libertatem pati possunt.

*‡ Et fit aimer son joug a l'Anglois indompte,
Qui ne peut servir, ne vivre en liberte.*

Hompage. Liv. I.

free themselves, and reduce all nations to slavery. But while they exercised a severe authority over their neighbours, they kept Rome in perpetual tumult and confusion, because they would not submit to the necessary restraints of law. The consequence of this principle which is common to the human race, is that in the establishment of governments, if so large a share of liberty be allowed to the people, as seems to be necessary to constitute social happiness, there is great danger that they will abuse their liberty and subvert the government: if sufficient power be vested in the government to restrain the violence of the people, then there is danger that the rulers will abuse this power and prostitute it to the oppression of the people, and the destruction of liberty. To hit upon a form of government, which would safely steer between these extremes, and while it represses the violence of the people, guard against the encroachments of the rulers, is the great desideratum in civil policy. Such however is the difference of human character in different ages and countries, owing to the difference of climate and state of society, that it is not probable that any one constitution can be discovered, which will be adapted to every country, and productive of these important effects. In constituting a government, therefore, it is necessary to take into consideration the state of society and manners, and establish it on principles that are conformable to them. In this country, this principle appears to have been adhered to as far as circumstances would admit. Our constitution is the best calculated to steer between the extremes of anarchy and despotism, of any that has been adopted.

It may be said with truth, that by the constitution of the United States, the powers of the several branches of the government, are so restricted, and check each other in such a manner, that they can never gain the strength of despotism, or be exerted to the oppression of the people. The equality of representation, and the frequency of elections, give the people an effectual check, upon their rulers, and at the same time, place them in the most perfect state of responsibility. Their liability to be dismissed from office, for misconduct, and their obligation to obey the laws which they make, will operate upon them as a perpetual motive to consult the general good, and to acquire the favour and confidence of the people. In-
deed

deed, there is every possible motive existing that can be, to induce the legislature of the United States, to exert all their talents for the public welfare, while no rational motive can exist to induce them to oppress, or injure the people. While the legislature is pure and uncorrupted, it will be impossible for either of the other branches of the government, to become despotic. A government that is founded upon the interest of the people can derive no pleasure from any consideration but the promotion of their welfare, and happiness. From this fair representation of the constitution of the United States, it is evident that it merits an unlimited trust, and that we may discard the dæmon of jealousy, which is a bane to the energy of government, and a poison to the confidence of the people.

It must be a pleasing consideration that we have discovered and adopted a constitution, which there is no probability will ever degenerate into tyranny. It would be a subject that would furnish the highest satisfaction, if we could trace in it those seeds of energy, which might spring up, grow, and arrive to such maturity, as to defend it from all the attacks of anarchy. If the general government has any thing to fear, it is to be apprehended from that quarter. While the wind is fair, and the sky serene, there is no danger but that the ship will sail with safety, but when storms, and tempests rise, is there not some danger that she may be wrecked on the rocks of disorder, or swallowed up in the whirlpool of popular violence? As we wish to guard against the approach of the remotest disorder, let us contemplate the difficulties we have to encounter, and prepare the remedy.

The state governments, like a chain of mountains, form a barrier against the encroachment of the general government—but may they not be converted into engines of opposition, to the most necessary measures? The pride of the large states, and their natural jealousy respecting the general government, may lead to some measures inconsistent with the peace of the union, for the purpose of maintaining their own importance. Could all the state governments be broken down, and then divided into states of proper and convenient extent, so as to provide such local regulations, as they can better provide than the legislature of the Uni-

ted States, and at the same time, not have so much power as to threaten or endanger the general tranquility, it would probably be found a great improvement in our constitution.

But at present, perhaps, the greatest danger arises from the introduction of principles which are equally destructive of civil liberty and good government. While we are avoiding the extreme of absolute monarchy, which has been so oppressive to the people, there is a possibility of our running into the opposite extreme, and renouncing those principles which are the basis of a free government. So much has been said respecting the majesty of the people, the fountain of power, from whom government originates, and for whose benefit laws are enacted, that many begin to entertain an idea that it is incompatible with their sovereignty, that they should be governed. Hence it is a common phrase, that the people are the masters, and the legislature their servants. The consequence is, that the supreme power yet remains in the people, that they may make, and unmake governments as they please, and that revolutions are forever at their command : That the legislature are bound to obey their instructions, and watch and pursue their will. Admitting these principles to be true, it follows necessarily that the people are not bound to regard the laws unless they meet with their approbation. For nothing can be more absurd, than to require of the masters, obedience to the mandates of their servants, unless they think it proper. Every law therefore must be taken into consideration by the sovereign people, and when they have given them their sanction, they will obey them. The slightest attention must convince every body of the impracticability of executing a government upon this plan. It is a principle of disorganization, it subverts order and introduces anarchy. To avoid this extreme, let us consider the true principles of our government.

Our government originated from the people, and was instituted for their sole benefit. The impracticability of assembling a great nation to collect their will, rendered it necessary that certain persons should be elected, to whom the power of acting for the people should be delegated. This constitutes our government, to be a representative

representative republic, and an attention to this leading feature will unfold the basis on which it is established, and the principles by which it is to be executed. A government by representation, implies the idea that the representatives stand in the place of the people, and are vested with all their power, within the constitution. In the Legislature, therefore, consisting of the representatives, is concentrated the majesty of the people, and the supremacy of the government. They are neither bound to obey the instructions, nor to consult the will of the people—but being in their place, and vested with all their power, they have a right to adopt and pursue such measures as in their judgment, are best calculated to promote the happiness and welfare of the community, in the same manner as the people themselves would act, if it were possible for them to assemble and deliberate on their common concerns. The reason why the instructions of the people are not to be regarded is, because it is impossible that the general sense should be collected : and even if that could be done, they have not those means of information which are necessary to qualify them to deliberate and decide. As to the instructions from any particular district, to the representative by them elected, they ought to have no influence, because when elected, a person becomes the representative of the community at large ; he cannot therefore regard the instructions of his immediate constituents, but must consult the general good of the community and not the particular advantage of a district.

The only mode by which a legislature can act, is by a constitutional promulgation of laws. No individual has the power to command or compel the people to do any act, for his personal advantage ; they can only be governed by general laws, virtually enacted by themselves, for their benefit, and which the individual members of the legislature, are as much bound to obey, as the people at large. The legislature therefore, can neither be considered as the masters or the servants of the people ; they are their representatives, possessing all their power for certain purposes : all their laws are the will of the people, expressed in a constitutional manner by their representatives, and on that ground are entitled to an implicit and unqualified obedience. It is to the laws,

only that the people are subject ; so that in the strictest sense of the word, this may be said to be a government of laws and not of men.

The pride of a nation or individual, may revolt at the idea of yielding submission to the mandates of a monarch : but it cannot be considered as degrading to submit to the national will, expressed by its representatives. A man must derive a dignity and importance from the consideration, that he is virtually his own legislator : and instead of wishing to elevate himself above the laws, thus enacted, he will be the more strongly induced to yield them obedience.— When the will of the people has been thus virtually expressed by themselves, and actually by the representatives, it cannot be again submitted to them, to decide, whether they are bound to obey. Implicit obedience is an absolute duty. If they deem the laws improper, unconstitutional, or oppressive, they have the right to elect different representatives, who will repeal them. It is this power of the people over their representatives, that constitutes the security of their rights, and not the power of resisting the laws. If the people at large are vested with the rights of reconsidering and deciding upon the acts of the legislature, all the advantages of representation are lost. The general will of the community could never be collected, different districts would form contradictory decrees, and instead of law and order, there would be perpetual controversies and confusion.

There must somewhere reside a supreme power in the government : it cannot be placed in the body of the people, it must be in the legislature, which is constituted for that purpose, where the government is republican : but where it is despotic, it is in the hands of the monarch. In the first instance, the laws are grounded on the general good ; in the last, the will of the monarch only is to be consulted : but the laws in the first case ought to be deemed as absolute, as they are pretended to be in the last. Where the laws govern, let them be absolute, supreme, and sovereign,

IT has already been remarked, that when man enters into a state of society, he resigns a part of his natural rights to obtain civil rights. Their security is the object of law, and bounds the power of legislation. Their enjoyment furnishes mankind with the greatest political happiness.

Civil law may then be defined, to be a rule of human action, adopted by mankind in a state of society, or prescribed by the supreme power of the government, requiring a course of conduct not repugnant to morality or religion, productive of the greatest political happiness, and prohibiting actions contrary thereto, and which is enforced by the sanction of pains and penalties. A few remarks will illustrate this definition.

Civil law is considered to be a more proper expression, than municipal law, a term made use of by the English lawyers, where the term civil law is usually by way of eminence, applied to the Roman or Imperial law—but as we have little connexion with the Roman law, and the term civil being commonly applied to our laws, I have restored it to its proper place, and have rejected the word municipal, which is too limited in its signification, to convey a just idea of this definition. It is a rule of action that is steady, permanent and universal, obligatory on the whole community, and adopted by mankind in a state of society, or prescribed by the supreme power of the government. It concerns them only in the social state, and points out the duties they owe to their neighbours, and to the community that protects them. " The outlines are to live honestly, hurt nobody, and to render to every one his due. It derives its authority, not only from being adopted by the universal and immemorial consent of the people as the common law, but from the positive acts made by the supreme legislature, which is the statute law. It requires a course of conduct, not repugnant to morality and religion, but productive of the greatest political happiness, and prohibits actions contrary thereto. The usual definition is, commanding what is right, and prohibiting

" *Juris precepta sunt hæc, honeste vivere, alterum non ledere suum equique tribuere.* Justinian's Inst. L. i. iii.

prohibiting what is wrong. But that is too indefinite and general, and more applicable to the moral than civil law. It is true that it is generally remarked by writers, that law is grounded on moral principles, but a few observations will evidence this to be an error. The sole purpose for which men unite in society, is the security of that portion of the natural rights which they reserve, and the civil rights which they acquire. The legislature, therefore, have no right to controul any actions, but those which are injurious to their rights, and endanger the existence of the state. It is evident that no government has adopted the moral law as a rule, because, in all, many actions are required to be done, which are morally indifferent, and many actions are not prohibited which are morally wrong. When it is acknowledged the government may omit the prohibition of immoral actions, and require the performance of indifferent, it follows as a consequence that they are guided by some rule different from morality. This rule is the political happiness of the people. It however must be considered, that no laws may contravene the principles of morality. When the legislature enact and publish laws, it is not for the people to examine them, and determine whether they will comply with them. They are virtually present by their representatives and assent to them when they are made. The laws therefore operate with the force of commands, and obedience becomes the duty of the citizens.

But the laws would be of but little validity, if they were not enforced by the sanction of pains and penalties. Human legislators bestow no rewards on the act of obedience, but the blessings which necessarily flow from it. They annex certain pains and penalties to every violation of their laws, which operate as motives on the mind, to enforce an observance of them. The measure of punishment is to subject the offender to an inconvenience greater than the advantage he can derive from the crime.

• Cicero has defined law to be a just command, directing what is right, and prohibiting the contrary. • Justinian has defined law, to be that which each nation has established for itself, and is proper to each state or civil society. • Blackstone has defined it to

• *Sanctio iusta iubens honesta et prohibens contraria.*

• *Quod quisque populus ipse sibi ius constituit id ipsius proprium civitatis est vocatur que jus civile.*

Just. Inst. lib. 1. tit. 2.

• *1 Black. Com. 44.*

to be a rule of action, prescribed by the supreme power of the state, commanding what is right, and prohibiting what is wrong. The definition of Justinian is too confined, and does not give an idea of the nature and extent of law. The definitions of Cicero and Blackstone seem to be grounded on the principles of the natural law, and do not reach the full extent of the civil law : and the definition of Blackstone is confined to statute law only, because it will comprehend those laws only which are prescribed by the supreme power of the state. In my definition, I have aimed to give a just idea of law in its fullest extent. It comprehends the statute, and the common law, and instead of limiting it to the commanding of what is right, and prohibiting what is wrong, I have extended it to the commanding or prohibiting of those actions which are morally indifferent, if it be necessary to promote the political happiness of mankind. This I consider to be the just bound of civil law.

The science of the law is grounded on certain first principles. These have been introduced by the statutes of the legislature, or have been derived from the dictates of reason, and the science of morals. On this basis, our courts have erected an artificial fabrick of jurisprudence, they have adjusted the various parts with the nicest symmetry ; and a deviation from any fundamental principle, deranges the whole superstructure. A judge therefore in forming his opinion, with respect to any particular case, must take into view the whole system of law, and make his decision conformable to the general principles on which it is founded. Nothing can be more improper than the practice of considering every case as standing on its own basis, and of deciding according to principles of right, which appear to be applicable to single cases. This will make the law uncertain, introduce contradictory determinations, and render it impracticable to systematize the principles of jurisprudence. But when courts take into view, the whole science, and square their decisions to the fundamental doctrines on which it is established, the consequence will be the introduction of that permanent uniform rule of administering justice, which is the ultimate object of government.

OF THE LAWS OF CONNECTICUT.

WE come now to treat of the code of civil law, adopted in this state, which consists of two parts, the common law and the statute law, which require a separate consideration.

I. The Common Law derives its force and authority, from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature, by any express act, which is the criterion by which it is distinguished from the statute law. It has never been reduced to writing, but depends on the general practice and judicial adjudications of courts. The common law is derived from two sources, the common law of England, and the practice and decisions of our own courts.

I. I shall first consider that branch of the common law that originated in England. As our ancestors adopted the form of, and acknowledged allegiance to the British government, it was natural for them to admit and establish their laws, so far as it was consistent with the difference of situation. From this circumstance, our common law became chiefly of English original, and we must trace their jurisprudence, to ascertain the foundation and extent of our own. The revolutions that England underwent by the conquests of the Romans, the Saxons, the Danes, and the Normans, rendered their law of complex origin. After the Norman conquest, as soon as the government had assumed a regular form, the acts of parliament and the decisions of their courts, laid the foundation of their present code. They adopted a principle which is common to all nations, that when a court had solemnly and deliberately decided any question or point of law, that adjudication became a precedent in all cases of a similar nature, and operated with the force and authority of a law. This practice is founded in the highest wisdom, and produces the best effects.

It establishes one permanent uniform, universal directory, for the conduct of the whole community, and opens the door for a constant progressive improvement in the laws, in proportion to the civilization

tion of their manners, and the encrease of their wealth, while the legislature were passing acts for general regulations, the courts were polishing, improving, and perfecting a system of conduct, for the minuter subordinate transactions of life, which by the collective wisdom and experience of successive ages, have advanced to the highest pitch of clearness, certainty, and precision.

Courts however are not absolutely bound by the authority of precedents. If a determination has been founded upon mistaken principles, or the rule adopted by it be inconvenient, or repugnant to the general tenor of the law, a subsequent court assumes the power to vary from or contradict it. In such cases they do not determine the prior decisions to be bad law; but that they are not law. Thus in the very nature of the institution, is a principle established which corrects all errors and rectifies all mistakes.

The common law of England is a highly improved system of reason, founded on the nature and fitness of things, and furnishes the best standard of civil conduct. It is to be found in the adjudications of courts, which have been collected and published by judges, lawyers, and other officers. These adjudications are contained in year books which are extant, from the reign of Edward the second, till the reign of Henry the eighth, and then in reports which have been continued to the present time. Besides these reports, the common law has been improved by treatises of a systematic nature, which are held in high veneration and respect.—Such are the works of Glanville, Bracton, Britton, Fitzherbert, Littleton, and Lord Coke—But no writer on law has acquired greater distinction than Sir William Blackstone. He has reduced order out of chaos, and in his commentaries, exhibited a complete system of the laws of England. From this work the student will obtain a general understanding of this science, in a much shorter time than from any other author. His writings entitle him to the thanks of every country where English jurisprudence is practised, and have secured to him a fame that will last as long as the memory of those laws on which he has written shall endure.

But I ought not to omit the names of Reeve, Powel, and 'Espinasse, the most distinguished judicial writers of the present age.

Reeve has exhibited a view of the origin, progress and gradual improvement of the English law, with all the elegance of an historical writer, and all the precision of a lawyer. Powel has facilitated the acquisition of legal science, by arranging and systematizing in the clearest manner, all the learning scattered over a thousand volumes, respecting contracts, mortgages, devises, and powers; and 'Espinasse has answered the same purpose with respect to practice, by his digest of the law of actions. These writers are inferior to none of their predecessors in point of genius and knowledge, and have an equal prospect of immortal fame.

From this code we derive the greatest part of our common law. Our ancestors having settled this country without the aid of the British crown, were under no obligation to obey the government, or observe the laws of the country, from whence they emigrated. They might have instituted their own government, and promulgated their own laws. But prudence and policy dictated the measure, for the purpose of acquiring the protection of a powerful kingdom. This voluntary reception of the English laws, by the general consent of the people, is the only foundation of their authority. At the late revolution, when we were separated from the British empire, the general consent and approbation of the people, established the common law of England, as far as it is warranted by reason, and conformable to our circumstances, to be the law of the land. It has also been the practice of our courts to regard the decisions of the courts of Westminster Hall, since the revolution, where they relate to similar questions. But these have no intrinsic authority. They rest on their reasonableness and propriety. But this method deserves high commendation, because it furnishes our courts with the opportunity of incorporating with our law, all the improvements that are made in England.

There is no general rule to ascertain what part of the English common law is valid and binding. To run the line of distinction, is a subject of embarrassment to courts, and the want of it great perplexity to the student. It may however be observed generally, that it is binding where it has not been superseded by statute, or varied by custom, and where it is founded in reason, and consonant

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to the genius and manners of the people. But the only certain rule by which the writer or the student can be directed, must be the practice and decisions of our own courts. As these have not been committed to writing, they can be learned only by attendance on the courts, where they are promulgated, which evidences the necessity of a treatise to point out how far, and in what manner our courts have adopted the common law of England. If reports had been taken of all the adjudications of our courts, the greater part of the common law might have been considered as adopted, and we should have had occasion to have recurred only to our own reports, for authorities. But as reports have not been taken, we are now obliged to search the English authorities for precedents and principles, which have been settled by our courts. This continues the difficulty of determining how far the English common law is binding. It is necessary in this place only to remark that such parts of it as have been admitted, relate to general maxims, and first principles, definitions of technical terms, the several kinds of things or estate, the formalities of contracts, and transfers of property, the nature of actions, the forms of declarations, the mode of pleading, and the mode of trial.

It was manifestly the object of the legislature of this country, at the commencement of the government, to introduce a general code of jurisprudence by statute. Hence we find many statutes in very early periods, producing a material variation from the English laws, and to this circumstance it is very probably owing that the laws in this state, are so much more different from the laws of the country from whence we emigrated, than they are in any other state in the union. In consequence of the adoption of this principle, we find that our ancestors, instead of considering the common law of England to be the basis of their jurisprudence, and in all cases binding, have only considered it as auxiliary to our statutes. In case of any defects in the statutes, recourse was had to the system of common law, to explain technical terms, to establish forms of proceeding, and to adopt such general principles, as could not be introduced by statute in the infancy of a country. The validity of it therefore in all cases depended upon its being approved of, and adopted by the courts, and the authority of the courts to admit it, originated

in the general consent of the people, as no statute was ever made on that subject. In such cases our courts exercised the same discretionary power and jurisdiction, as have been exercised by all the English judges, from the earliest periods of their government, to the present time. There are a vast many improvements which were introduced by the courts without any legislative act. The best part of the fame of the celebrated Lord Mansfield, is owing to his meritorious exertions, to extend the speedy remedy of the law as far as possible, to prevent the circuitous, expensive and lengthy applications in chancery. Our courts have always acted upon the same general principles, as the British courts. Conformably to this practice is the opinion of the superior court, in the case of *J Wilford, &c. against Grant*, which was approved by the supreme court of errors. "The common law of England we are to pay great deference to, as being a general system of improved reason, and a source, from whence our principles of jurisprudence have been mostly drawn. The rules, however, which have not been made our own by adoption, we are to examine, and so far vary from them as they may appear contrary to reason, or unadapted to our local circumstances, the policy of our law, or simplicity of our practice." Under these restrictions and limitations, the common law of England may now be considered obligatory in this state. Whenever a question arises which has not been settled by statute, or by some principle of the common law, adopted by our courts, we are then to examine and compare the rules of the common law of England relative to the point, and if they are found reasonable and applicable, the court will adopt them, and if not, then they will decide the question on such principles, as result from the general policy of our code of jurisprudence, and which are conformable to reason and justice. That part of the English common law, which has been thus approved by the courts, may be considered as our common law by adoption; that part which has not been thus adopted, may in virtue of the general assent of the people, and the practice of our courts, be considered obligatory, so far as it is consistent with reason, adapted to our local circumstances, and conformable to the policy of our jurisprudence.

The English common law has never been considered to be more obligatory

obligatory here, than the Roman law has been in England. There in all cases where the reason of the Roman law was applicable, the courts have adopted it ; and they have derived many important and useful rules and principles from it.

2. The practice and decisions of our own courts, have given birth to another branch of common law. We have introduced the English practice with respect to the authority of precedents. Courts are not at liberty to depart from prior decisions, in similar cases, unless they are repugnant to reason. It is therefore a common practice, when any dispute arises respecting a point of law, to refer to precedents. The uncertainty, and contradiction of oral reports of cases, induced the legislature to pass an act, requiring the judges of the supreme court of errors, and the superior court, in all disputes upon questions of law, to reduce the grounds and reasons of their opinions to writing, and lodge them with the clerk of the superior court, for the purpose of forming a perfect and permanent system of common law. This is a most excellent expedient to ascertain the points settled by the court, but reports of the cases are necessary to compleat the plan. To accomplish this purpose, Mr. Kirby has published a valuable volume of reports of cases, adjudged in the superior court, from the year 1735, to 1788. This volume of reports is all that we have written upon our common law : we are therefore obliged to trust to the memory of man, for those adjudications, on which our rights depend. This will continue that uncertainty, and contradiction that has been the subject of so much complaint, till a reform takes place. Reports would be of the highest advantage, to improve and perfect our laws, to fix and perpetuate a permanent universal rule, that should render the decisions of different courts uniform and consistent.

The only courts whose decisions have the authority of precedents, are the supreme court of errors, and the superior court. The judgments of the latter may be revised on a writ of error brought to the supreme court of errors, where determinations are conclusive, and who are the derneir resort in settling the principles of law. But so long as the judgments of the superior court are unreversed, they are deemed to be law.

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The consequence of admitting the doctrine that a judicial decision becomes a rule in all similar cases, has been very important. Our courts by legal adjudications, have given new force, and evidence to a principal part of the common law of England, and have established it to be the common law of this state. They have by a series of decisions ascertained the construction of the statutes, by which many very important points, and principles have been settled.

The consequence of the doctrine that the English common law is not in itself binding in this state, has been the introduction of many new rules, and principles, which have greatly improved our legal system. Our ancestors unfettered by the shackles of forms, customs, and precedents, have attended to enlarged, and liberal views of policy; and from the operation of our statutes, which so materially changed the common law, at the same time regarding the singular, and fortunate situation of our country, at its first settlement, with our difference in manners and character, from the nation from whence we migrated, have deduced a variety of legal principles, and have adapted them, to the state of this country, which constitute the main excellence of our jurisprudence.

When it was received as a general maxim, that the common law was binding only, when reasonable, and applicable, the necessary consequence was, that in all cases of a defect of common law, not supplied by statute, the courts must supply it by an adjudication, grounded upon the basis of all laws, reason and justice. This permitted them to reject many of the principles of the common law, which having been introduced into England in a barbarous, and ignorant period, when the rights, and privileges of man were inaccurately understood, had become inconvenient, and burdensome, but being interwoven in their code, could not be there rejected by their courts. It gave our courts at the same time, an opportunity to introduce all those important principles, which better information had discovered. In all instances then, where there has been a legal decision of our courts, repugnant to any of the rules of the common law, it may be considered as repealed, and the adjudication of our courts, is common law in this state. Our courts still possess, and exercise the same privilege, and whenever they find

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the common law unreasonable, impolitic, or unjust, or repugnant to the general tenor of our jurisprudence, they have rejected it, and adopted, such rules in their decisions, as they conceived to be right, and consonant to the general principles of our law. † Such was the case of Wilford, vs. Grant. Judgment had been rendered against adults, on trial, and conviction, and against minors by default, without assigning them guardians. The question on a writ of error was whether judgment, could be affirmed against the adults, and reversed as to the minors. It was agreed that the rules of the common law, were against a reversal in part in such case; but the court said, that it had been admitted in other cases without any apparent diversity of reason, and as it did not appear to have been adopted in practice, so as to become authoritative, they would not regard it, but in pursuance of the general principles of reason, and law, they would reverse the judgment as to the minors only.

One part of the English common law consists in particular local customs, which affect only the inhabitants of particular districts. But in this state we have no local customs, but the citizens are all governed by the same general rule: unless we except the five city corporations, whose peculiar rights, and privileges are designated in the statutes by which they are incorporated.

II. The other branch of our laws consists of statutes which are enacted, by the general assembly, the supreme legislative power.

Statutes are either general or special, public or private. General, or public statutes, have universal authority. They are printed and distributed thro the state, and courts are bound officially to take notice of them, without being specially pleaded by the party who wishes to take benefit of them. Special or private statutes, relate to the concerns of particular persons, they are not published with the public statutes, and courts are not bound to regard them, unless they are specially pleaded by the party, who wishes to take benefit of their operation, and in whose favor they are made. Statutes are said to be declaratory of the common law, or remedial of some defects, operating by way of enlarging, or restraining.

Statutes affirm, alter, amend, or change the common law, as cases require, or introduce regulations wholly new. In this country it

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has been the object of the legislature to promulgate an equal code of laws, correspondent to the liberal principles, which are prevalent among mankind. They avoided adopting the slavish principles interwoven in the legal code of the native country of their ancestors, in the times of ignorance and tyranny. Having no prejudice in favour of long-established errors, and the venerable absurdities of antiquity to combat, they had an uninterrupted career in establishing political liberty, and happiness. Such is the advantage of founding a government, and instituting laws in an enlightened period of the world.

In framing laws, it is the duty of the legislature to render them as clear, intelligible, and explicit as possible, so that there can be no doubt about the meaning and intent of them, but as this is extremely difficult, mankind being apt to differ about the meaning of them, certain rules have been adopted for their interpretation and construction. The fairest and most easy method of construction, is to consider and investigate the intent of the legislature by the signs with which it is expressed.

1. " Words that are used in enacting laws, are to be taken and considered in their common, customary, and popular use, and no grammatical construction will be admitted to vary or controul the apparent meaning of the law.

2. Terms of art, or technical terms must be considered according to the import and meaning of them in that art, science, or trade from whence they are taken.

3. Where words are clearly repugnant to each other, in two laws, the last will supersede the first. Later laws abrogate prior contrary laws, is a maxim adopted by all nations in their civil institutions.

4. When words are dubious, equivocal, or intricate, it is proper to consider the preamble of the act, which will often explain the intent of it, or compare them to some other law made by the same legislator and relating to the same point.

5. We must always take into consideration, the subject matter
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about which the law is concerned, and affix to the words made use of, a meaning corresponding to the subject to which they are applied. For the same words when applied to different subjects, have different meanings. That meaning must be taken which is commonly intended, when employed upon that subject about which the law is conversant.

6. Where words have no signification, or a very absurd one, if taken according to their literal common acceptation, there it is necessary to deviate from the common sense of the words, and construe them in such a manner, as will deduce a rational and consistent meaning. Mankind often make use of figurative, and metaphorical expressions, which if literally taken, would be nonsense—but legislators should be cautious how they run into this error; for it is not safe to leave courts to deduce their meaning from such uncertain premises.

7. A common and universal method of ascertaining the meaning of a law, when the words are dubious, is to consider the reason and spirit of the law, or the cause which induced the legislature to make it; for it is a common maxim, that when the reason of a law ceases, the law itself ought to cease. This method at first view, seems to be rational and well grounded. There may be many instances where a literal construction will do injustice, and many where the case is within the meaning and design of the law, but not within the letter. Here it seems to be necessary to give courts a power of considering the meaning and spirit of the law, and of applying it accordingly. If the case be within the letter but not within the meaning, that they may so determine, or if without the letter, but within the meaning, spirit, equity, or mischief, that they may extend the law to it. But this mode of construing law, gives too great latitude to judges, and may be improved to oppressive purposes. It destroys that uniformity, certainty and precision, which are the essence of law. It throws the rights of mankind afloat, by placing them upon the arbitrary opinions and capricious whims of judges. The lawyer can never tell, how to advise his client, and the people cannot know the law. This rule therefore should be admitted with great caution, and practised upon with great prudence.

8. Penal Statutes are always to be construed strictly, for the benefit of the subject. Nothing more is to be deduced from the words, than what they expressly warrant, and they are not to be extended by implication. Thus the statute which renders it a capital crime for a woman to conceal the death of a bastard child, either by drowning, or secret burying, or any other way, must be confined to the only methods of concealment expressed by the statute, and the words "any other way," are void for uncertainty.

9. Statutes not penal, and which merely concern property, are to be expounded liberally, so as to answer the design of the legislature. The expressions like those which are void, in the above-mentioned penal statute, would where the statute was not penal, be extended to remedy the inconvenience for which the statute was intended.

10. Every part of the statute must be so construed, that if possible the whole must be allowed to stand. Thus any seeming contradiction must be reconciled by the manifest design and intent of the legislature.

11. A saving inconsistent with the body of the statute is void.

12. Where the common law and statute differ, the latter supercedes and annuls the former.

13. Later statutes, abrogate and repeal prior contrary statutes. This must be understood where the statutes are expressly contrary, or negative words are used, otherwise, if both the statutes can be reconciled, they must stand, and have a concurrent operation.

14. If a statute repealing another, be afterwards repealed, the first statute is revived without any express words, by mere implication.

15. Statutes calculated to diminish or restrain the power of any subsequent assembly, are of no validity, for each assembly must possess equal authority—of course they cannot limit or controul each other.

16. Statutes it is said, which are repugnant to the principles of

of justice, and the dictates of common sense, are void : and so are all statutes subversive of the fundamental principles of the constitution, with which no legislature has any right to interfere. It is contended that it is necessary that there be some restrictions and limitations to govern and controul the legislative power : that there must rest in the people a right to guard the constitution, and in judges a power to restrain the operation of unjust and unreasonable laws. It is considered by some writers, that only the consequences arising collaterally from a statute, that are absurd or unreasonable, are void ; but that if the legislature expressly pass an act, that is unreasonable, no court has a right to reject it, because this would elevate the judicial above the executive power. It is said by others, that tho the legislature is sovereign and supreme in all matters within their jurisdiction, yet they are governed by the principles of the constitution, the rules of justice, and the dictates of reason ; that when they exceed these limits, their acts are of no validity. Judges are not bound to conform to them in their determinations, and the people are not bound to yield them obedience.

This idea, tho very popular and very prevalent, requires some consideration. It is true that it may be said, that if there be no bounds set to the power of the legislature, in construing the constitution, that they may encroach upon the rights of the people ; they may pass laws requiring things immoral and unjust, and they may destroy the constitution ; that therefore, in such cases, the judiciary, shall have the power to declare such laws to be unconstitutional and void. A case may be stated, that the legislature pass an act requiring the people to commit some crime, authorising a court to condemn a man for a crime without evidence, or establishing their seats during life. In such cases the law would be so manifestly unconstitutional that it would seem wrong to require the judges to regard it in their decisions.

In like manner it may be said, and with equal truth, that the judiciary granting them this power, may adjudge and declare certain laws which are clearly within the constitution, and which are necessary to preserve the public safety, to be unconstitutional and void. It will be agreed, that it is as probable that the judiciary

will declare laws to be unconstitutional which are not, as it is, that the legislature will exceed their constitutional authority. It is possible that the legislature and the judiciary, will make such encroachments on each other, on the constitution, and on the rights of the people, but it cannot be called probable. A little reflection will make it evident, that no question will ever arise in very clear cases: where the point is really doubtful a question may arise.— There may be some instances where good men may very honestly differ respecting the construction of the constitution, because from the imperfection of language, the expressions may be ambiguous. It is therefore only with respect to such questionable points, that we are to consider who ought to be vested with the power of ultimate decision, and not in those extreme cases which may easily be stated, but probably never will happen. A few considerations will determine where this power ought to be placed.

The legislature must be considered as the supreme branch of the government. Previously to their passing any act, they must consider and determine whether it be compatible with the constitution. Being the supreme power, and bound to judge with respect to the question, in the first instance their decision must be final and conclusive. It involves the most manifest absurdity, and is degrading to the legislature, to admit the idea, that the judiciary may rejudge the same question which they have decided; and if they are of a different opinion, reverse the law, and pronounce it to be a nullity. It is an elevation of the judiciary over the heads of the legislature; it vests them with supreme power, and enables them to repeal all the laws, and defeat all the measures of the government. Whenever a law is passed by the legislature, the first business of the courts will be to decide whether it be constitutional and valid. The lowest courts must permit the question to be seriously and deliberately agitated before them, respecting the validity of the law, and then they must solemnly decide, whether an act passed by the supreme legislature be constitutional and obligatory on the people. Indeed the necessary consequence is, that no law passed by the legislature, can be deemed binding, till it has received the sanction of the supreme judiciary, and has been declared to be constitutional. The lower
courts

courts may decide differently, and the obligation to obey a law may be uncertain, till some individual brings the question before the supreme tribunal for ultimate decision. Where this tribunal is composed of one branch of the legislature, perhaps no danger could arise, because they must have previously in their legislative capacity, have decided the law to be constitutional: but where the judiciary are independent of the people and the legislature, and hold their offices by an appointment of the supreme executive, it is a total prostration of the government, to vest them with a power of deciding that legislative acts are null. The legislature will lose all regard and veneration in the eyes of the people, when the lowest tribunals of judicature are permitted to exercise the power of questioning the validity, and deciding on the constitutionality of its acts—A principle so dangerous to the rights of the people, and so derogatory to the dignity of the legislature, cannot be founded in truth and reason.

All these inconveniencies are avoided by placing the ultimate right of decision in the supreme power of the land. The legislature have the sole power of making laws. The judiciary, have the sole power of expounding them, but they have no power to repeal them. The legislature are not under the controul or superintendence of the judiciary—if they pass laws which are unconstitutional, they are responsible to the people—who may in the course of elections dismiss them from office, and appoint such persons as will repeal such unconstitutional acts. On this power of the people over the legislature, depends their security against all encroachments, and not on the vigilance of the judiciary department.

Such are the outlines of our code of laws: in addition to which we have a system of equitable rules, to moderate and soften the rigor, and supply the defects of the laws. No government can stand on a firm basis, unless the laws are uniform in their principles, and universal in their operation. But from these general rules, there may be some instances, where individuals may in particular cases, be unable to obtain compleat justice, and there will be some cases to which general rules will not extend. This points out the necessity of courts of equity, who have power to relieve against the indirect

indirect unjust operation of general laws, and to furnish relief in all cases, where the ordinary course of law does not extend.

To pursue our enquiries with facility and perspicuity, it is necessary to exhibit a general plan of the work.

Government is instituted to maintain the rights, and redress the wrongs of individuals. We shall therefore in the first place delineate the form of the government, consisting of the legislative, executive and judicative powers. In the second place we shall consider the rights of persons, which will be divided into absolute, and relative; absolute, belonging to them as individuals, and relative as connected with their fellow-creatures.

The principal of these rights respect property, we shall therefore in the third place, define the several kinds of things, and their mode of conveyance. Mankind, when secure in the enjoyment of these rights, are in a state of political happiness; but as their repeated violation calls on government, for a constant exertion to redress them, it is necessary to consider in the fourth place what acts amount to an infraction of them, so as to be denominated wrongs, and the modes of redress. As the conduct of individuals, not only affects each other, but concerns the peace, and good order of government, we shall in the fifth place consider those actions, which are denominated crimes, because they disturb the peace, interrupt the good order, and endanger the existence of the community. To this will be added the mode of prosecution, and the various kinds of punishments for each offence. From the general operation of universal laws, some individuals under certain circumstances, may suffer injustice, as an indirect, collateral consequence of them, and it cannot be expected that positive laws will reach every possible case, and redress every possible injury. We shall therefore in the sixth place, consider the powers of courts of equity, instituted, and calculated, to supply the defects, and remedy the inconveniences of general laws.

A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

BOOK FIRST.

Of the Powers of Government.

CHAPTER FIRST.

OF THE CONSTITUTION OF CONNECTICUT.

THE constitution of this state, is a representative republic.— Some visionary theorists, have pretended that we have no constitution, because it has not been reduced to writing, and ratified by the people. It is therefore necessary, to trace the constitution of our government to its origin, for the purpose of shewing its existence, that it has been accepted and approved of by the people, and is well known and precisely bounded.

Antecedent to the settlement of America, the king of England made sundry grants of territory to individuals. Our ancestors purchased the lands in the limits of Connecticut, of the grantees of the crown, and the Indian natives. Embarking in the enterprise without the royal aid, or encouragement, no form of government was prescribed. Too remote from their native country to be governed by their laws, they were under a necessity of framing a constitution and laws for themselves. In this respect, they were in a state of nature, and had the right, as well as the power of pursuing those liberal ideas of civil liberty, which had impelled them to undertake such an hazardous enterprise. Within the limits of this state, two colonies, settled about the same period.— * In the year 1635,

a number of persons from Massachusetts, invited by the fertility of the land adjoining Connecticut River, made a settlement on its banks, and erected the town of Hartford, and the neighbouring towns. ⁶ In the year 1637, a colony from England, made a settlement at New-Haven. Sundry towns on Connecticut River, and the settlement at New-Haven, were without the jurisdiction of Massachusetts, or any government. They were in a political point of view, in a state of nature, and had a right to establish such form of government as they pleased. Sensible of the advantages of society, and the necessity of government, they at each settlement, agreed upon and subscribed certain articles, by which they voluntarily entered into a state of society, formed the social compact, and erected two governments, Connecticut and New-Haven, which continued separate, till their union by the royal charter, in 1662. These colonial governments, derived their authority from the voluntary association and agreement of the people, and we have here the most singular, and the fairest example of the operation of that natural principle, which impels mankind to unite in society. Here the social compact was made and entered into, in the most explicit manner. Here is the origin of a government upon natural principles.

But it being a common opinion, that new discovered land belonged to the king, whose subjects had discovered them, and that he alone had the right and the power to establish legal governments, and grant the title to the lands, the colonies of Connecticut and New-Haven, made application to Charles the second, king of Great-Britain for a charter. The king granted them a liberal and extensive charter, dated, April 23d, 1662, that incorporated both colonies into one, by the name of Connecticut, that erected a form of government, upon the same plan they had before voluntarily adopted, and that granted them a title to the territory within the limits of the colony. The application of the people for this charter, and their voluntary acceptance of it, gave efficacy to the government it constituted, and not the royal signature. This is the only charter that ever was granted by an English monarch to the people of Connecticut, and is now by statute the basis of our constitution. It

continued

continued in force, till the declaration of Independence dissolved our connexion with Great-Britain, and raised us to the rank of a sovereign state.

Had the charter of Charles II. been considered as the basis of the government of Connecticut, the declaration of independence which annulled it would have placed the people in a state of nature, with the privilege of erecting such a form of government as they thought eligible. Indeed no form of government could have been valid, unless approved, and adopted by the people in convention, or in some other way. It is also unquestionably true, that in consequence of the dissolution of the political connection with Great-Britain, the people of this state had a right, if they had thought proper, to have exerted it, to have met in convention, and established a different form of government. But at the declaration of independence, the subject was considered in a different light. The authority of the government was supposed to have originated from the assent of the people, and never to have been dependent on the royal charter. During the whole period of the existence of the colonial government, Connecticut was considered, as having only paid a nominal allegiance to the British crown, for the purpose of receiving protection, and defence, as a part of the British empire: but always exercised legislation respecting all the internal concerns of the community, to the exclusion of all authority, and controul from the king, and parliament, as much as an independent state. Acts of parliament were not deemed binding here, and the assent of the king, and parliament, was not necessary to give efficacy to our statutes. The necessary consequence was that the renunciation of allegiance to the British crown, and the withdrawing from the British empire, did not in any degree affect, or alter the constitution of the government. The constitution which originated from the people, and had been practised upon, continued in operation, after the declaration of independence, in the same manner as before, and was equally valid. The people were only discharged from a nominal allegiance to the British crown, which they had recognized for the purpose of protection, and defence. These being withdrawn by Great-Britain, and war made upon them, they had a right to enter into a confederacy with any other states for the purpose

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of mutual defence : but their internal government remained unaltered, and the same. The general assembly which convened next after the declaration of independence, proceeding on this principle passed all the laws that were necessary to carry into effect, the constitution of the government on the original basis. They ratified, and confirmed the declaration of independence, they passed an act recognizing the ancient form of government, they made such alterations, and introduced such amendments, as the change of circumstances required. If the principles before stated are true, then the conduct of the legislature was constitutional, and there was no necessity of calling a convention of the people, to agree on the form of the government.

But if it be admitted that the royal charter was the sole basis of the colonial government, then it must be acknowledged that the dissolution of our connection with Great-Britain, annulled the constitution, and reverted the people to a state of nature. The legislature under such circumstances had no power to act under the former constitution, and their acts were unconstitutional, having no binding authority on the people. But admitting this to have been true at the time, yet the subsequent conduct of the people, in assenting to, approving of, and acquiescing in the acts of the legislature, have established, and rendered them valid, and binding, and given them all the force, and authority of an express contract. For there is no particular mode pointed out, by which the assent of the people to any particular form of government, is to be obtained. It may be expressed by delegates chosen for that purpose, to meet in convention, or it may be implied by a tacit acquiescence, and approbation.

Thus when we trace our government to its origin, we find it to rest upon a constitution, which was the voluntary contract of the people, and which has been ratified, confirmed, and approved by all succeeding ages. Our transition from a state of political subjection to Great-Britain, to independence, and sovereignty, was almost imperceptible. Tho we were witnesses to a most singular revolution, yet we experienced no commotions among the people, and no convulsion in our domestic government. Our legislature

was never interrupted in their business, and they proceeded with the same calmness, and under the same form of government, to exert their powers, to repel the encroachments, and oppression of Great-Britain, as they did in the ordinary affairs of legislation, when they acknowledged her supremacy.

The statute containing an abstract and declaration of the rights and privileges of the people, and securing the same, enacts, that the ancient form of civil government, contained in the charter of Charles the second, king of England, and adopted by the people of this state, shall be and remain the civil constitution, under the sole authority of the people, independent of any king or prince whatever. And this republic shall forever be and remain, a free, sovereign and independent state, by the name of the State of Connecticut. By this statute, the people are expressly considered to be the origin and fountain of power. All government is derived from them, and is to be directed only to the promotion of their welfare. No individual is elevated high in rank above the rest, by the splendor of titles and ensigns of royalty, in whose majesty is placed the power of government; but this power is vested in the majesty of the people.

The people possess all the power that can safely be vested in them in their collective capacity, and all that is necessary to guard and secure their rights. They elect the supreme, sovereign authority of the government. The frequent opportunities of displacing their rulers, by annual elections, give them a most effectual restraint upon their conduct, and fix the firmest barrier of their liberties.

The powers of government are lodged in three bodies—the legislative, the executive, and the judicative. The legislature is composed of two branches, the governor, the lieutenant-governor, and the twelve assistants, elected annually by the people, and called the council. The representatives from the several towns, chosen twice a year, and called the house of representatives. These two branches are called the general assembly or court; they convene twice a year; they hold their deliberations in different apartments, and no act is valid without the concurrence of both. They

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are emphatically called the supreme power of government. They can enlarge, diminish and controul the jurisdiction and authority of the other powers ; they can make and repeal laws ; they appoint the civil and military officers, and can do all the acts of a sovereign independent state.

The executive power is lodged in the hands of the governor, who is distinguished as the supreme executive magistrate ; the governor and council, the treasurer, the comptroller and the secretary.

The judicative power, is vested in the governor, the lieutenant governor, and the council, who are denominated the supreme court of errors, and are the dernier resort in all matters of law ; and the superior court consisting of five judges appointed by the general assembly, and whose jurisdiction extends through the state.

These may be considered as the supreme powers of the government. Their authority is general, extending to every part of the republic, and relating to the whole collective body, as one great corporation. But as a state, comprehending so large an extent of territory, cannot be governed and regulated like a small republic, it has been found necessary to make sundry divisions and subdivisions, for the purpose of facilitating and expediting the distribution of law and justice, to every individual, and through every part of the state. On this account the state has been divided into counties, probate districts, towns and societies. This has opened the door for the establishment of subordinate officers, whose power is confined to the several divisions for which they are appointed.

The subordinate officers in the executive department are the sheriff, who is appointed by the governor and council, whose duty it is to preserve the peace of the county. Justices of the peace, appointed by the general assembly in the several towns, to preserve the peace of the county, but their authority is chiefly of a judicial nature.

The subordinate judicative power, consists of several courts of inferior and local jurisdiction. The courts of common pleas in each county ; courts of probate in each district, and justices of the peace in every town, who have jurisdiction through the county.

Towns

Towns are considered in the nature of corporations, their powers resemble those of a pure unmixed democracy. The inhabitants have a right to assemble together, they possess a small share of legislative authority, they have a right to pass votes respecting the internal affairs of the town, under certain restrictions and limitations, they appoint proper officers to manage the concerns of the town. These corporations are an important branch of the executive, and are calculated to regulate those minute and subordinate concerns of the people, which cannot be reached in very large corporations.

Societies are instituted for religious, or ecclesiastical purposes, and are vested with the power of appointing proper officers, and supporting public worship.

These are the civil powers of the state, but as mankind are exposed to foreign invasions, and internal insurrections; and are sometimes obliged to defend their lives, and fortunes, by arms, a military power is instituted for that purpose. This power is subordinate to the civil, and consists of the citizens within certain ages and descriptions. The governor is captain general, or commander in chief, the lieutenant governor is lieutenant general, and there is a proper gradation of officers thro every subordinate rank. On the strength and bravery of this militia, the ultimate safety of the republic depends when the appeal is to arms.

Such are the outlines of our constitution, and form of government. The minuter branches, and subdivisions, will be fully considered, when we come to treat of these subjects in detail.

The ultimate object, and scope of the constitution, are the safety, and happiness of the people, by the security, and preservation, of political liberty. It has therefore been enacted by statute, that no man's life shall be taken away; no man's honor, or good name shall be stained; no man's person shall be arrested, restrained, banished, dismembered, or any ways punished; no man shall be deprived of his wife, or children; no man's goods or estate shall be taken away from him, nor any ways indamaged, under the color of law, or countenance of authority, unless clearly warranted by the laws of the land. This may be called the great charter of the people, and is

an ample declaration, and bill of rights. In the course of our enquiries we shall find that sufficient provision has been made for their security, and legal remedies devised to furnish redress when they are infringed.

A question of importance has been agitated respecting the power of a legislature, to alter the constitution of a state. But it is generally agreed, that where a constitution has been framed by the people at large, by convention appointed for that purpose, or by the tacit agreement of the people, that no legislature has the power to alter it, and that the right rests in the people alone. This is a prudent precaution against any attempts in the legislature, to extend their authority, and establish despotism. It however retards the progressive improvement of government, by rendering necessary a recurrence to the people, to introduce every amendment, which experience may prove to be expedient. A constitution therefore that is unalterable by the legislature, should contain nothing but the outlines of the government, and leave it to the legislature to fill up the minuter parts, which will always authorise them to vary it according to the progress of improvement.

The constitution of the state of Connecticut is unalterable by the legislature in every respect, that is necessary to its preservation, and at the same time permits the legislature to make alterations, wherever improvements can be introduced. It is unalterable in these respects, that it cannot be changed from a representative republic ; that the people cannot be deprived of the rights of an annual election of one branch of the legislature, and of a semi-annual election of the other : that the number of representatives cannot be lessened ; that the legislative power cannot be exercised, but in the two branches ; that two assemblies must be holden annually. While these principles are adhered to, there is not the remotest danger, that the government will verge to tyranny. But in the executive and judicative departments, and perhaps, in almost every other respect, not enumerated, the legislature have from time to time, the power of making such alterations, as wisdom may dictate and the happiness of the people require.

CHAPTER SECOND.

OF THE LEGISLATIVE POWER.

THE legislative power is lodged in the General Assembly, which is composed of two branches, called the Governor and Council; and the House of Representatives. To treat of this subject with clearness, I shall distribute it under the following heads. First, to consider each branch distinctly, with their peculiar and separate rules, and customs. Secondly, the mode of election, with the qualifications of electors, and elected. Thirdly, the privileges of the members of assembly. Fourthly, the time, place, and manner of their meeting. Fifthly, their power and jurisdiction, with their rules and customs. Sixthly, their method of making statutes, and proceeding in private matters. Seventhly, their adjournment, and dissolution.

I. I am to consider each branch distinctly with their peculiar rules and customs—and *d*

1. Of the Council, which consists of the governor, the lieutenant-governor, and twelve assistants. The governor is elected annually by the freemen. He does not constitute a distinct branch, having a negative upon the other two, as in some states; but he is a member of one branch; he is considered the highest official character in the state, he presides in the council, he has the power of voting in all matters, and where there is an equi-vote, he has a double vote, or casting voice. The lieutenant-governor, sits in the council with the right of voting, and in case of the death, or absence of the governor, he presides, with the right of a casting voice, in case of an equi-vote. The twelve councillors, or assistants, are annually elected by the freemen, they sit in the same apartment with the governor, and lieutenant-governor, and no act can pass but by the major vote. The governor and lieutenant-governor, or either of them, with six assistants, constitute a sufficient number to transact business. If the places of the governor and lieutenant-governor be vacant, or they be absent, the senior councillor presides, who with six assistants are authorised to proceed in business. They must take the oath to support the constitution of the United States, and the oaths prescribed by statute.

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2. The House of Representatives is composed of representatives, elected by the freemen of the several towns in the state. The freemen of each town have a right to elect one, or two representatives, to represent them in every general assembly, that is holden. They meet in a separate apartment from the council. Forty members must convene before they can proceed to business. They choose a speaker, who presides in the house, with the privilege of a casting voice when an equi-vote happens. They choose a clerk who is sworn, and whose duty is to make proper entries of all their doings, and transmit to the other house all bills, and petitions that ought to be transmitted. The members must take the oath to support the constitution, and the oath of representatives prescribed by statute. When the house is thus formed, they become vested with certain powers and prerogatives, independent of any superior. Their decisions and determinations are examinable in no other court. They may punish their members for misconduct, before the house, by passing a vote of censure; by a reprimand of the speaker, by commitment for contempt, or by expulsion. They may examine, hear, and determine any difference that shall arise about the election of any of their members, and may determine who is, and who is not elected. They may examine the qualifications of the members, and if any persons are returned, who are not freemen, or who have obtained their election by bribery and corruption, contrary to the statute law, they may expel them. They can never expel a member for any act done previously to his election, unless it be a crime that rendered him ineligible. If a man after his election commit a crime that disqualifies him to be elected, there is a propriety, that the house should have the power to expel him. They have no power to examine, or censure a person for conduct before his election, that did not disqualify him to be elected. The people have a right to be represented by any person not expressly excluded by law; and the house of representatives, cannot judge respecting the propriety of their choice, nor throw a stigma upon the character of the person elected. The whole power of expulsion is confined to three cases, misconduct in the house, or the commission of crimes that render the person ineligible, or bribery and corruption in obtaining the election. In their decisions they are bound to conform

form to the laws in being. The house have certain standing rules and orders, which are read at the opening of every session of assembly, that are calculated to introduce regularity in proceeding, decorum in debate, and to support the dignity of the house.

II. Of the mode of election, and the qualifications of electors and elected, and *f*

i. I shall consider the mode of election. This business is conducted in the meeting of the freemen, in the several towns in the state, annually in April and September. The constables of the town warn the meetings, and the votes are to be taken by an assistant or justice of the peace, if any are present, otherwise by the constables; but the practice is in some towns for the civil authority to take the votes, and in some towns the constables. In the meetings held in the several towns in the state, on the Monday next following the first Tuesday in April, the freemen make choice of the governor, and lieutenant-governor, in the following manner. Every freeman writes on a piece of paper, the name of the person for whom he votes, and the same presents to the presiding authority, who, on receiving the same, shall in the presence of the freemen seal them up, and thereon write the name of the town and votes for the governor, and in like manner for the lieutenant-governor. The presiding authority shall either by themselves, or the representatives of the town, convey them to Hartford, and at the election deliver them to those persons who are appointed by the general assembly a committee to receive, sort and count said votes. The general court of election is holden at Hartford on the second Thursday of May annually, and the persons who have a majority of votes, are declared to be elected governor, and lieutenant-governor: but in case there be not a majority of votes in favour of any person, then there is no election by the freemen, and they are to be chosen by the assembly.

g The assistants are chosen in the following manner. At the freemen's meeting in the several towns in the state, holden annually on the third Monday of September, every freeman may give in his vote for twenty persons, their names being fairly

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written

f Statutes, p. 44.

g Ibid. p. 44, 45.

written on a piece of paper, whom he judges qualified to stand in nomination for election, the May ensuing, which he shall present to the civil authority, or constables present : who shall enter the names of the persons voted for, with the number of their votes, a copy of which they shall send sealed up, to the general assembly at New-Haven, holden on the second Thursday of October, by the representatives of the town. At which assembly the votes shall be compared, and the twenty persons who have the greatest number of votes, shall be the persons whose names shall be returned to the several towns, as standing in nomination for the next election ; out of which number the twelve assistants shall be chosen. At the freemen's meeting, holden in May as before mentioned, every freeman has a right to vote for twelve of the persons nominated to be assistants, in the following manner. The presiding authority are to begin with the person who stands first in nomination, and the freemen are to bring in their votes * on a written piece of paper to them who shall seal them up, and write thereon the names of the persons voted for, Each freeman having a right to vote for twelve of said persons. These votes are to be transmitted to Hartford, in the same manner as votes for the governor ; and the twelve persons who shall have the greatest number of votes, shall be declared to be elected assistants for the ensuing year.

The representatives are chosen twice a year, at each of the freemen's meetings above mentioned. Each town has a constitutional right to send one or two, as they think proper, excepting some towns which have been incorporated since the revolution, that are restricted to one representative. The method is for every freeman to give his vote to the presiding authority, by presenting the name of the person he votes for, written on a piece of paper, and the person who has a majority of votes is declared to be elected.

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* It is not necessary that the name of the person voted for, should be written on the paper, but that there should be some writing on the paper, for if it be blank, it will not be counted. This provision is said to have been made for this purpose : If any person in nomination should be in a freemen's meeting, and any freeman should not incline to vote for him, and at the same time was unwilling he should know it, he might give in a blank, and it could not then be known whether he voted for him, or not. This was intended to give the freemen a chance to vote according to their opinions, without being biased, or overawed by men in office.

3 The peace, prosperity, and security of a republican government depend on the fairness and freedom of elections. Where these are controuled by undue influence ; and bribery, and corruption prevail, the constitution is in danger of being subverted. On this principle, our laws have wisely guarded against them, by enacting—that no person shall offer to another, any written vote for any member of the legislature, unless first requested, upon penalty of forty shillings, and that no person shall offer or accept any reward directly or indirectly, for voting or not voting, for any member of the legislature, on penalty of five pounds, and on conviction of a second offence, to be punished by disfranchisement. And that such person as shall be elected by such illegal practices, shall be incapable of serving in such assembly, unless he can satisfy them that it was done without his privity, and that he had not directly or indirectly any concern therein.

But these laws are a feeble barrier against the influence of bribery and the arts of intrigue, in comparison with that which is derived from the opinion and the virtue of the people. In almost every country where the people have possessed the right of election, bribery and corruption have been introduced, and electioneering has prevailed. The candidates appear publickly, and solicit the votes of the electors. In England, months are spent in canvassing towns and counties, the basest arts of intrigue are practised, the country becomes a scene of riot and dissipation, and thousands are expended in procuring an election. In the neighbouring states it is not uncommon for persons to set themselves up for candidates, and call on their friends for their votes and influence.

The corruption and disorder usually attendant on popular elections, have not only disgraced the people, but have brought an odium on representative governments, and have given too much colour to an opinion, that the people are unworthy that inestimable privilege which they are so willing to abuse, and are so easily induced to betray. It is therefore essential to the security of a representative government, that we not only secure to the people the rights of election, but that we also inspire them with proper sentiments to exercise it for their own happiness and welfare.

In this state, no instance has ever been known where a person has appeared as a public candidate, and solicited the suffrages of the freemen, for a place in the legislature. Should any person have the effrontery or folly to make such an attempt, he may be assured of meeting with the general contempt, and indignation of the people, and of throwing an insuperable bar in the way of attaining the object of his pursuit.

These nice and delicate feelings of the people respecting elections, constitute the firmest bulwark of our excellent constitution. It is a sentiment that ought to be engraved on the hearts of every individual, that it is their indispensable duty to confer their suffrages on the most worthy and respectable characters in the community, and that the man who is guilty of the base arts of intriguing, and electioneering, is unworthy the confidence of the people, and unfit for an office in the government. Every candidate for public honors, ought to have this sentiment indelibly impressed on his heart, that the obtaining of an office by the base arts of intrigue and electioneering is a personal disgrace: and that there is no true glory, in an elevation to the most important station, in a government, unless the suffrages of the people can be considered as a voluntary tribute of respect to acknowledged merit, and praiseworthy conduct,

The freedom of our elections is strongly supported by their frequency, and the number of the representatives. No person will find his account in taking much pains for elections, which so frequently happen, when the large number of the legislature diminish the personal influence and importance of each individual, to a narrow compass. Great has been the rage for sometime past of lessening the representation, to save expense and expedite business. Experience will demonstrate that the present large house of representatives, dispatch public business with more celerity, than smaller bodies, and there is no doubt, but that a diminution of their number would soon lead the way to an augmentation of their trifling wages, so that no saving of expence would be obtained. While no inconvenience is experienced, why should the representation be lessened, which would deprive a number of persons of the opportunity

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nity of obtaining that information, concerning public affairs, by attending the general assembly, which enlarges their own minds, and enables them to disseminate political knowledge among the people.

2. I am to consider the qualifications of the electors, *i* who must be freemen, and for that purpose must be inhabitants of some town, of twenty one years of age, possess a freehold estate to the value of forty shillings per year, or forty pounds personal estate in the list, in that year wherein they desire to be admitted, or possess such estate, and be excused from putting it into the list, and be of quiet and peaceable behaviour, and civil conversation. Such persons may apply to the selectmen of the town, where they belong and on procuring a certificate from the major part, that they are qualified, any assistant or justice of the peace, is empowered to administer the oath in open freemen's meeting, legally assembled, and their names are to be enrolled in the office of the town clerk. Every person while he continues a freeman, has a right to vote for every public officer, and continues a freeman, notwithstanding any reduction in point of property : but for scandalous behaviour and infamous offences, the superior court may disfranchise him, and on reformation, may restore him. The selectmen are liable to a penalty of three pounds six shillings, for making a false certificate, but if a person is admitted a freeman on such false certificate, he is not disfranchised by a conviction of the selectmen. A question has been started, respecting the justice of excluding a person from the rights of a freeman, on account of his poverty. It is said that no person ought to be admitted to vote for the rulers, unless his circumstances in life, raise him above the danger of being influenced by the power of bribery and the arts of intrigue. Perhaps, property is not the most effectual safeguard against corruption, and that fairness of character, would afford a juster rule of discrimination, than the quantum of property. But in this state, of so little value is the estate requisite to qualify a person to be a freeman, that no inconvenience has been experienced by it.

3. Of the qualifications of persons to be elected members of the legislature. & Every freeman is eligible of common right, except-

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i Statutes, 88. & *Ibid*.

ing those, who hold certian offices which are deemed incompatible with seats in the legislature, and have been expressly excluded by statute. ¹ These are judges of the superior court, ^m and those officers under Congress, who are excluded from seats in the legislature of the United States. No statute has pointed out a crime which disqualifies a freeman to be elected into either branch of the legislature. No statute authorises the expulsion of a representative who is a freeman, if he be not unduly elected. The statute says, that no person shall be accepted as a representative, unless he be a freeman. As the statute law stands, every freeman, however infamous, is eligible into the legislature. ⁿ If we have recourse to the common law, we shall find that no crimes render a person ineligible, but high treason, and felony. A house of representatives, being only one branch of the legislature, can have no constitutional right to expel a member for any act done previously to his election, unless he is disqualified by the common law, or by statute.

III. The privileges of the members of assembly, next require our consideration, and it is declared by statute, ^o that no member shall during the session of the general court, or in going to, or from said court, be arrested, sued or imprisoned, or in any ways molested or troubled, or compelled to answer to any bill, plaint, declaration, or otherwise, before any court, judge or justice, cases of high treason and felony excepted. All such suits would abate, and the imprisonment would subject the prosecutor to an action of false imprisonment, and if the member should be committed to goal, he might on information be discharged, by order of the house in the legislature to which he belonged.

Every member is entitled to the privilege of freedom of speech in all debates, and cannot be called to account for it in any other court. Instances have happened, where actions of defamation have been brought for words spoken in the house of representatives, and the court refused to sustain them.

IV. Of the time, place and manner of their meeting—The stated times of meeting, are at Hartford, on the second Thursday of May, and at New-Haven on the second Thursday of October, annually. The house of representatives meet at their chamber in the
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¹ Statutes, 374.
⁴ Inst. 48.

^m Ibid. 409.
[•] Statutes. 28.

ⁿ 1 Black. Com. 17. ¹ Bac. Abt. 576

state-house in Hartford at eight o'clock in the morning of the day of election, and proceed to the choice of a clerk, then a speaker. The certificates of the election of the members are then produced and read, and their names enrolled. The clerk then administers the necessary oaths, and the house is formed. A message is then sent by some of their members, to wait on his excellency the governor, and inform him that the house is formed. The governor and council, who hold their offices till the election is completed, meet in the council chamber. The house of representatives being formed, at the direction of the governor, both houses proceed in procession to the meeting-house, where a sermon is delivered by some gentleman of the clergy appointed by the governor: a commendable practice, instituted by our pious ancestors, at the time when they founded the government, and which their pious descendants have continued to the present time.

When public service is ended, both houses return in like procession to their apartments, and appoint committees jointly to receive, sort, and count the votes of the freemen, and declare the persons duly elected. The committees of both houses, meet and proceed to count the votes of the freemen, and declare who are chosen governor, lieutenant-governor, and assistants,—and the persons elected, being sworn the council is formed, and the general assembly becomes organized.

The representatives on the second Thursday of October, at nine o'clock in the morning, meet at the state-house in New-Haven, and proceed to form the house as at Hartford. The governor and council, having convened at the same time, the general assembly is again organized.

Thus by the constitution, there are two meetings of the legislature each year, to consult and promote the welfare of the people. Besides the stated annual meetings the constitution has provided a method of convoking the general assembly at other times, if occasion requires. The governor, or in his absence the lieutenant-governor, or the secretary, upon any emergent, or special occasion, may call a general court upon fourteen days warning, or less if they think it needful, and they shall give an account thereof to the assembly when convened.

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V. Of the power and jurisdiction of the general assembly—
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1. Of their power in the public affairs. *p* The general assembly possess the supreme authority of the state; they have the power to make laws, and repeal them; to dispose of lands undisposed of, to towns or particular persons; to institute, and stile judicatories and officers, as they think proper; and to grant all public taxes, and lay duties for a revenue. They may call any court or magistrate, or any other officer or person whatever, to account for any misdemeanor, or mal-administration, and for just cause may fine, displace, or otherwise punish them, as the nature of the case requires. If no governor or lieutenant-governor be elected by a majority of the votes of the freemen, the general assembly have the power to elect them; and if after the election, by death or otherwise, the office of any of the assistants become vacant, the general assembly may supply it by election. They may grant pardons, suspensions, and goal delivery, upon reprieve, in capital and criminal cases, to any person that has been sentenced in any other court. They have the power of appointing the judges of the superior court, of the courts of common pleas, of probate, and the justices of the peace. They have the power of regulating the militia, under the authority of congress, and the appointment of the generals, the colonels and the majors, and the choice of commissioned officers in military companies must be by them approbated before they are valid.

Such are the powers of the assembly that are enumerated by statute; but by the nature of the constitution, they possess the power of doing, and directing, whatever they shall think to be for the good of the community. They may encourage literature, manufactures, commerce and agriculture, by bounties, or exclusive privileges. They have the power of erecting, and constituting corporations for these purposes. They may alter, or create counties, towns and societies.

In this body resides the supreme and sovereign authority, which is essential to the existence of civil government. It is difficult to define or limit its extent. It can be bounded only by the wants, the necessities, and the welfare of society. This power be-

ing placed in a body, chosen by the people, and the individuals frequently reverting to a state of citizenship, there is no danger of their exerting it, to ruinous and oppressive purposes, because they must suffer the ill consequences of their own tyranny. But the sovereignty be considered as a quality of the supreme legislature, yet there are certain general rules, and fundamental principles, by which they are to be restricted, and directed in their proceeding. The constitution must be held sacred and inviolable, and can never in any measure be varied or amended without the consent of the people at large, by whom it was originally made, and from whose approbation and consent it derives its authority. In enacting laws they are bound to consult the highest political happiness of the people; they may never restrain the natural liberty of any person, unless it be found necessary for that purpose, and they may never oppugn the immutable principles of morality. Under these restrictions, they have the supreme sovereign power, of making such laws as they judge proper, and the people are under the strongest obligation to yield the most explicit obedience.

2. Of the jurisdiction of the assembly, in matters of a private nature. They have the power of authorising, and validating the doing of a variety of acts not binding in law, as the sale of estates by minors and married women, where it will be for their interest.

They pass special acts of bankruptcy in favour of those persons who have been reduced and rendered unable to pay their debts by unforeseen accidents, and unexpected misfortunes. It is impossible to point out the rules by which they are governed in such cases, for having sovereign power, and being a changeable body, they are directed only by their discretion, upon the circumstances of every particular application. It may generally be remarked, that the petitioner must shew that his losses have been sustained by unavoidable misfortunes, and not by his own imprudence and misconduct; that he has acted honestly and uprightly in his business, that he makes a full disclosure of his property, that by the granting him an act of insolvency, his property may be justly distributed among his creditors, and he be restored to the rights of a citizen, and enabled to prosecute some honorable business for his support; that

denying him such a favour, will defeat an equal distribution of his estate, and involve him in a calamity, from which his creditors can derive no benefit, and prevent him forever from being useful to himself, or the community. But whenever congress shall pass general laws of bankruptcy, pursuant to the power vested in them by the constitution, this power will cease.

The general assembly exercises the power of granting bills of divorce, in cases beyond the jurisdiction of the superior court, in which they judge it reasonable. No precise rule can here be pointed out, but it is a matter of discretion. From the instances which have taken place, it may be inferred, that presumptive proof of adultery, and direct proof of cruelty, abuse and enmity, which render the situation of the suffering party dangerous, or miserable, and defeat the design of the matrimonial connexion, will induce the legislature to grant a divorce, and make such disposition of the estate of the husband, where he is the offending party, as is reasonable for the support of the wife.

The general assembly have reserved to themselves original jurisdiction, in all suits for relief in equity, where the value of the matter, or thing in demand, exceeds the sum of sixteen hundred pounds. At first the assembly reserved all the power of a court of equity in their hands; but experience teaching the inconvenience of the practice, induced them to delegate all their power in all matters under sixteen hundred pounds, to the superior and county courts. Why the whole power was not delegated, and why the superior court is not as able to decide all controversies in equity, exceeding sixteen hundred pounds, as they are in law, no reason can be given.

A question of great nicety and difficulty arises respecting the constitutional jurisdiction of the general assembly, in controversies of a private and adversary nature. It ought to be deemed an inviolable maxim, that when proper courts of law are instituted, the legislature are divested of all judicial authority. It is true, that in England in early times, the parliament assumed jurisdiction in private controversies, and a similar practice has been adopted by the assembly in this state. It has sometimes been contended

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that the assembly by virtue of their supreme authority, may superintend and overlook all inferior jurisdictions, and may proceed upon the principles of abstract right and perfect justice, to grant relief to the people in all instances in which they have sustained wrong in any possible manner whatever. This would be a power of a most excellent nature, to be lodged somewhere, if we could find a perfect person to exercise it. But it is apparent, that the admission of this would destroy all ideas of a uniform, permanent system of law, erect one great arbitration over the state, and throw every thing afloat on the wide ocean of whim and caprice.

It is enacted by statute, that no petition shall be preferred to the assembly, but in cases where no other court is by law competent to grant relief. The true meaning and construction of this statute, is not that petitions may be preferred to the assembly in cases where the courts refuse relief, because that by the rules of the law relief ought not to be granted; but that where a new case happens, that has never been contemplated by a court of law, or equity, so as to adopt a rule respecting denying, or granting relief, then such omitted case, may be the ground of an application to the legislature. For it can never be said, that a court is incompetent to grant relief in a certain case, when by the rules that are adopted by the court, relief ought not to be granted. A contrary construction will be productive of mischievous consequences.—If an equitable claim, that has been disallowed by a court of law or equity, or if an apparently equitable claim, that must be dismissed by court of equity as well as of law, be a proper foundation for an application to the general assembly, their jurisdiction must be extensive, and they may review the determinations of all the courts they have constituted. How many instances can be found, where challenges in law and equity have been erroneously, as well as legally rejected, upon which a petition can be preferred to the assembly, with a statement of facts which might induce a tribunal, that acted upon discretionary principles of doing justice, to believe that relief ought to be granted. If they can interfere in one instance, they can in all, and the consequence will be, that every controversy must ultimately be decided by the legislature. It therefore is the

only maxim, that can be adopted consistent with the genuine principles of the constitution, that no legislature has a right to interfere in any private controversies, between man and man, which are cognizable by the courts, tho such courts have rejected a claim apparently just, because by the rules that they had adopted, or the laws in being, no relief ought to be granted. For such interference not only destroys the certainty, and uniformity of laws, but is of itself, an *ex post facto* law, which no legislature can constitutionally pass. Let the legislature make good laws, and leave it to the courts to expound them.

It must however be acknowledged, that the legislature have paid no regard to these principles, tho fairly deducible from their own law. I have known repeated instances where they have sustained applications that manifestly and expressly were excluded from relief by the general laws. I have known petitions preferred to obtain relief in cases against the decision of courts and juries, and the assembly have gone over the head of such decisions and granted relief.

I have known them grant relief, when the claim was barred by the statute of limitation; tho it is one of the clearest principles in a court of equity, that no relief can be had against the operation of such a statute: for all statutes of limitation, suppose that there is a possibility, that just claims may be barred, but the necessity of preventing disputes of a long standing will justify the measure.

When we consider the legislature as a legal tribunal, exercising this extraordinary branch of jurisdiction, it exhibits our jurisprudence in a singular light. We have courts of law and equity, instituted for the purpose of deciding all questions of right, between man and man, by positive rule, as well as by equitable principles. But if a man should fail to obtain redress in the ordinary courts of judicature, he may then apply to the extraordinary judicature, the general assembly, who are not governed by the principles of law, and equity, but render justice according to their sovereign will, and pleasure. It is true, that at the first settlement of the country, the general assembly was considered as a judicial tribunal, and appeals were admitted in all cases, from justices of the peace, to county

courts, then to superior courts, and then to the general assembly. This must have been owing to the inaccurate ideas of our ancestors; with respect to the proper power to be lodged in the different branches of the government. Hence we find that as their knowledge increased by experience, they were constantly lessening their judicial jurisdiction, till finally they disburdened themselves of the whole, excepting in cases of equity, where the sum in dispute exceeded sixteen hundred pounds. As soon as the legislature have established proper tribunals, for the decisions of all controversies, according to law and equity, they can have no right to interfere in the decision of such controversies : for the human mind cannot imagine a greater absurdity than to establish courts of law and equity to determine all questions of right between man and man, and then to admit the legislature to exercise a sovereign authority, in relieving against their determinations. The constitutional power of the legislature is to make laws, of a court of judicature to expound them ; but where shall we stop if the legislature, in private disputes, may make a law, which shall relieve against the operation of a prior law of their own making, as in the cases of statutes of limitation. We shall have one grade of tribunals to act by established, uniform, and general rules, and another to reverse their decrees without regard to rules.

If the legislature were to pursue the principles which result from their determinations, they might grant relief against all decisions at law, and in equity, and might set aside all statutes of limitations ; but they never consider themselves to be bound by prior decisions. They furnish a remedy in one case, and deny it another, standing on a similar basis—Of course they never have any general rules to govern their proceedings. Let a case be ever so equitable, no man has any grounds on which he can calculate with certainty respecting relief. If the right of the case be doubtful, yet so uncertain is the rule of decision, that there is a possibility of success. Indeed from the nature of the tribunal, it is utterly impracticable to systematize the principles of proceeding : they are therefore obliged to adopt that abominable doctrine, that every case is to stand on its own bottom, and be determined according to its particular circumstances, and they can take no other guide than sovereign whim
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and supreme discretion. The consequence of this has been the accumulation of business of a private and adversary nature, which is extremely burdensome to the legislature, and inconvenient to the parties. A considerable portion of the time of each session, is taken up in hearing private disputes.

Not only do the legislature disregard prior decisions, but where an application has been rejected at one session, it is no bar to another application for the same thing : and by repeated applications, the suitors sometimes by changes of the members of the legislature, a very changeable tribunal, will gain their causes. This is in effect, offering a premium to litigation.

No tribunal can be less adapted to the decision of private disputes, than the legislature. The house of representatives consists of nearly one hundred and eighty members. It is impossible for them in the ordinary course of hearing, to investigate the truth of a long intricate story, or to comprehend all the principles on which a decision ought to be founded. In such a numerous body we can not expect that coolness and candour in their deliberations, which ought to mark the conduct of a judicial tribunal. Generally, I do not think that one member in ten, is master of the cases decided by the legislature. It is a serious reflection, that the rights of property should be dependant on the vote of such a tribunal. I am confident that it very rarely happens, when they interpose, that they accomplish that justice, which they aim to pursue. It is strange they can wish to exercise a power so manifestly unconstitutional, and so highly inconvenient. I know of no other legislature which assumes such an extraordinary jurisdiction ; and I hope for the honor of the state, this only reproach to our system of jurisprudence, will very soon be wiped away.

It is enacted by statute, that no petition shall be preferred, unless the value of the debt, damage, or matter in dispute, exceed seven pounds. In this place, two general rules that respect the members of the legislature, may be inserted. * That no member shall disclose any matter enjoined to be kept secret, or make known to any person, what any one member of the court speaks, concern-

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* Statutes, 132.

† Ibid. 28.

ing any person or business, that may come in agitation in the court, under a penalty of ten pounds : ^u and that no member shall appear as an attorney, unless in his own case, or the town he represents, or in such case, wherein the law will not allow him to sit as judge, and if any member appear at the bar, in the character of an attorney, his seat is vacated for the time for which he was elected.

VI. Of the method of making statutes, and proceeding in private matters. And, 1. Of making statutes, and proceeding in public matters.

The session of assembly is opened by an address from the governor to both houses, in which he suggests to their consideration, the proper business to be done, and lays before them all public papers, letters, and communications.

A bill may originate in either house. In the house of representatives, no member may bring in a bill, without first obtaining leave of the house. This must be done by motion for leave, when the member states the substance of the proposed bill. The granting leave sometimes is objected to, and a debate ensues ; but the usual method is to grant leave on motion, without objection or debate.—The house sometimes appoint committees to prepare and bring in bills on particular subjects, and sometimes to take into consideration any special matters, and report by bill or otherwise. In some cases, committees are appointed by both houses to join in consideration of any matter, and make report. When the bill is brought in, it is read once and laid on the table, and cannot be read again on the same day, and proposed by the speaker for debate, without order of the house. On a second reading of the bill, the speaker proposes it for debate. If it be lengthy, and contains sundry paragraphs, it is usual to consider it by paragraphs. Any member may propose any amendment or addition. When the members have finished the debate, and the question is called for, the bill being read a third time, the speaker puts it to vote. If the bill pass, an entry is made by the clerk, and the bill without ceremony, or parade, is by the clerk transmitted by the hand of the officer who waits on the house, to the secretary, who by the sheriff transmits it

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to the governor. When a bill passes the council, the secretary makes an entry and sends it by the officer, to the speaker of the house of representatives. When a bill passes one house, and is transmitted to the other, it may be taken into consideration. In the house of representatives, they proceed, as tho the bill was brought in on motion. If the bill pass without alteration, it is transmitted to the secretary, and becomes a public act, irrevocable without the consent of both houses; but if either house pass it with alterations, or negative it, then it must be transmitted to the enacting house, who may appoint a committee of conference: the bill is returned to the other house, who appoint a committee. When the committee have conferred, a report is made by the committee, of the reasons given by the enacting house, to the negating house, when the question of reconsideration and concurrence is tried: if it passes in the affirmative the bill becomes a public act, if in the negative it is dead, and can be revived only on motion for reconsideration. If a bill pass, and during the session, either house wish any amendment, it must be proposed by message to the other, as the joint concurrence of both is necessary to the alteration: the proposed amendment must be stated—if both houses agree, it will be valid, but if either dissent then the original act stands. When an act is passed, the secretary records it, and it is in force from the rising of the assembly.

In the October session of assembly, the house of representatives appoint committees to receive the military returns, and make report, to receive the lists from the several towns and make up the grand list, to receive the votes of the freemen and count them, jointly with a committee from the council, and report the persons nominated for election in the ensuing May. In the May session, committees are appointed to receive military returns, and the additions to the lists, and report. The members for the several counties, nominate the judges of the county courts, justices of the quorum, and justices of the peace, for each county, and the judges of probate in the districts in the several counties, and lay in bills for their appointment. The members that live in the limits of brigades nominate general and field officers—and lay in bills. But the concurrence of both houses is necessary to the appointments.

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These are the outlines of the general mode of proceeding founded on custom, or express rules which have been adopted—but with respect to which no statutes have been made. These rules contain sundry other minute directions, which I need not here enumerate: but I cannot fail to remark upon the conciseness and simplicity of the mode of transacting business in the legislature. There is no public formality in communicating the acts of one house to the other. The acts attested by the secretary or clerk, and transmitted by an officer, is all that is required. The house of representatives, never resolve themselves into a committee of the whole house, to consider any subject. All bills, however important, are subjected only to one discussion, unless they are postponed, and a single vote decides their fate. This mode is extremely well calculated for expedition, but it must be acknowledged, that it sometimes precludes that fair chance for deliberation, enquiry, and discussion, which is had in other legislatures.

2. Of the method of proceeding in private matters. The mode of bringing private controversies before the assembly, is by preferring a petition or memorial, stating the nature of the dispute, and signed by the party; to which must be annexed a citation to the opposite party to appear, signed by proper authority, a duty of twelve shillings paid, which must be legally served on the opposite party, by leaving a copy with him, at least twelve days before the first Tuesday after the commencement of the session of assembly; on which Tuesday, the party must be notified to appear. The petitioner must appear the next Wednesday after the commencement of the session, or his petition will abate. All memorials, where no person need be cited, must be lodged in the secretary's office, on or before the eighth day of the session, or they shall not be heard. But the legislature may dispense with this rule, and admit on motion.

The mode of trial of adversary matters is as follows.—The respondent may plead in abatement to the petition, on account of any defect in the manner of bringing it forward, or that the matters contained in it, do not warrant the interposition of the legislature, in the nature of a general demurrer. If there be no plea in abatement, it is usual to go to trial on the merits without

pleading. The governor calls both houses together, when the proceedings are public. Witnesses are introduced, and examined, and the counsel argue the causes. When the public hearing is finished the houses separate and take the cases into consideration and debate the matter if they please. If either house refuse to abate a petition, on a plea in abatement, it goes of course to a hearing. Both houses must concur in any grant, and in case of differing votes, they confer by committees as in public bills. If a grant be made, a bill in form is drawn pursuant to the grant, and passed into a resolve, which is in the nature of a decree. * If on trial, it appear that either party has given the other unjust trouble, the party wronged, shall recover his just cost, and damages.

If a petition be called, and the party cited does not appear, it may be heard before the houses separately. In such cases, and in petitions where there is no opposite party, the method of proceeding in the house of representatives is, to hand the petition to the speaker, and when it is read, some member having been previously thereto requested, informs the house that the petitioner wishes to be admitted on the floor, to be heard in support of his petition, which is granted of course. The petitioner may then come forward with counsel if he pleases—and may enforce his petition by proof and arguments, as he thinks proper. When the hearing is finished, the house proceeds to a consideration and determination. In like manner, the petitioner may be heard before the council, and if the houses differ in their votes, committees of conference are appointed, as in case of public bills, and if both houses concur in a grant, a bill in form passes into a resolve, and establishes the grant. Sometimes when the facts are many and intricate, they appoint a committee of the members to hear, examine and report the facts, with their opinion thereon, and sometimes of persons who are not members.

VII. This subject will be closed by considering the adjournment and dissolution of the assembly. Either house, may adjourn from day to day, and both houses may adjourn to any proper time, within the limits of their appointment.— y but no general court can be dissolved or prorogued without the consent of the major

part.

* Statutes, 191.

y Statutes, 128.

part. The members are considered, as holding their offices till new appointments are made. An actual dissolution of the council happens annually ; of the house of representatives, semi-annually, which is the only mode, by which a dissolution can be effected.— When they have finished the business before them, both houses convene, and the governor after an address to them, dismisses them from any further attendance, which is called the rising of the assembly.

A stranger in looking over our constitution, and observing the frequency of the election of both branches of the legislature, the vesting in it the appointment of all officers, usually appointed by the executive, the giving so little power to the governor, would think that it must render the government extremely feeble and inefficient. But when he came to observe it in practice, he would find it to be well-calculated and balanced to answer the purposes of its institution.

A sentiment has for a long time been impressed on the minds of the people, that it is best for the community, to continue in office all persons who have once been honoured by their suffrages, in case they continue to merit their confidence. In consequence of this, there are but few instances where persons have been left out of any of the higher offices, till age and infirmity rendered it necessary. This noble sentiment seems to be interwoven in the character of the people, and has a powerful tendency to render public offices secure and permanent. In the election of the council, the mode established, is wisely calculated to prevent any change, by the influence of any sudden whim or caprice : while the people have full power every year to dismiss a person whose misconduct had alienated their regard and confidence. The privilege of the freemen, to give their suffrages for twenty persons to stand in nomination for election, and the law that the twenty who have the highest number of votes, shall stand in nomination, gives a decided advantage to those, who are actually in office, because they must be best known, and will be most generally voted for. The practice of placing those who are assistants, the first on the list, according to seniority of office, tho others may have a greater number of votes,

is a great security of their re-election ; because the law requires that those who stand first in the nomination, should be first voted for. In such cases we find that there is a wonderful mechanism in voting. The freemen in general will not have any personal attachment to the persons nominated, and they will generally vote for those who are first called. There may be some places where local feelings may operate, but this will rarely be sufficient to counteract the general indifference. Numbers towards the close of voting will usually retire. These circumstances will forever cooperate, to give sufficient security and permanency, to the seats of the assistants, and to counteract the intrigues of party, and the fluctuation of popular instability. But at the same time, the assistants can never obtain such certainty of continuing in office, as to tempt them to extend their power, and encroach on the rights of the people. They must consult the public good, to secure the suffrages of the freemen, for whenever they become generally unpopular, they will infallibly be dismissed from office. This advantage then resulting from the mode of election, has no effect but to render permanent the seats of those who conduct well, by guarding them against the schemes of parties : but when the conduct of an assistant requires his dismissal from office, the people have ample power to accomplish it. This mode of election, therefore, may with propriety be considered, only as a check upon popular instability, and not any infringement upon freedom and fairness in election.

The mode of placing the names of the persons in nomination cannot be called unfair or injurious as relative to the candidates. The person who has the highest number of votes, has no greater right to be elected an assistant or to have his name so placed as to give him a better chance to be elected than he who has the smallest number. If none have a preferable claim, and if there will be a certain mechanism in voting, let whatever mode be adopted, it is clearly good policy to direct its operation in favour of permanency and stability in government, especially when it is so popular as in Connecticut.

The election of the house of representatives twice each year, produces no inconvenience. The smallness of the districts from
which

which the people assemble, prevent its being burdensome, the frequency of election prevents intrigues, and the disposition to re-elect men of merit, prevents any general change of the members.

But the vesting in the people, and in the legislature, the appointment of the executive and judiciary, seems at first view, to be leaving so little power for the governor, who is called the chief magistrate, that the executive arm cannot be sufficiently strong to carry the laws into effect. If this state constituted a distinct government, unconnected with the United States, it is beyond a doubt, that the power of the executive must be encreased to give stability, and energy to the government. But while it constitutes a part of the union, and directs only the internal concerns of the state, the power of the supreme executive, will be found adequate to every purpose, while the limited extent of it produces the best effects.

The governor has the power of making so few appointments, that he cannot by force of his office, establish and arrange such a connexion of friends, and train of dependents, as to secure his re-election by his official influence. He must depend upon his capacity and patriotism, to retain his seat. He will not be able to command it. But in some states, so great is the patronage of the governor, that by his appointments to office, he may form so powerful a combination in his favour, as to secure his election, and give him an influence prejudicial to the freedom and independence of the people. A governor ought not to have the means of accumulating such power in his own hands. It will be a constant temptation to keep such an object in view in all his appointments, and the public good will invariably be sacrificed to his ambition. He will appoint those only, who combine their exertions, to promote his interest, and if there be a number of well-meaning, honest men, who wish to get rid of such oppression, or who conceive him to be unfit for the office, he will be sure to keep them out of office, to prevent them from counteracting his schemes. The appointment by the legislature as in this state, precludes all these inconveniences, and tho it may be considered that an annual appointment, must render such offices too insecure, yet the general principle having been adopted, that when persons are once appointed to an office, they

they are entitled to be re-appointed, unless they have become disqualified by infirmity or misconduct, they may consider themselves as appointed during good behaviour : but the appointment being annual a person may at any time be left out, when he becomes infirm ; or may be dismissed for misconduct, without the formality, and expence of an impeachment.

But there is another consideration which evidences an important advantage in our constitution : as the general government regulates all national concerns, and conducts the intercourse with foreign nations, there is no necessity of a very strong executive in the states. If the state executive be vested with great patronage and influence by force of appointments, the consequence is, that as the head of the state government, the governor draws to himself, so much importance, that he will view the government of the union, with a jealous eye. He may be apprehensive, that the splendor of his office, may be clouded and the strength of his arm lessened by it. This will be a perpetual temptation to him to counteract the measures of the general government, in support of his personal dignity, and the extensive influence, he may acquire by his power of appointments, may enable him to make a very serious and formidable opposition. But the executive of this state is admirably well calculated for a government, that is subordinate in certain respects to a general government. Here is no person distinguished by such power and influence, that he will be jealous of the union ; but the first magistrate, and every member of the state government, will consider their importance, and respectability, augmented by their connexion with the general government. They can have no personal motives to attempt to embarrass the measures of it ; but if the governor should be actuated by such a jealousy, his power will be insufficient to defeat its measures. In all the states it must be important, to have such a general distribution of power, as will be best calculated to carry into execution the laws of the state, as well as of the union, without admitting a combination of power to counteract them. But in the general government, the supreme executive must be vested with powers co-extensive with his duty. The preservation of the peace of the union, and the protection against foreign invasion. Here we may with propriety require strength in the executive.

The

The foregoing theory, perhaps, may be considered as confirmed by the fact, that in no state in the union, has the administration of the general government met with more decided approbation and firm support, than in Connecticut.

CHAPTER THIRD.

OF THE EXECUTIVE POWER.

THE executive is divided among several officers, which will be considered under two heads, the supreme, and the subordinate.

I. The supreme executive power is confined to narrow limits by the nature of our constitution, and our union with the United States.

Tho the power of the governor is less in this state, than in some others, as he does not constitute a distinct branch of the legislature and can make but few appointments to offices, yet it still deserves to be considered as a station of great respectability and dignity. In his legislative character, he is the president of the council. In the executive department, he is the supreme executive. *z* He is the chief magistrate of the state, with the stile of his excellency. *a* He is commander in chief of the militia, with the power of appointing the adjutant general, two aids du camp, and of dismissing commissioned officers. He signs the commissions of all judges, justices of the peace, and military officers. *b* He has the power of justice of the peace throughout the state. He is the channel of correspondence with neighbouring states, and with the government of the United States. All communications of public papers, and acts of congress are transmitted to him, from the heads of the executive departments, and all orders from the supreme executive of the union, are directed to him. He has the power of issuing proclamations upon all proper occasions. *c* He may reprieve a condemned malefactor, till the next general court.

The governor and council have some share of executive power.—
d They appoint the sheriffs in the several counties. *e* They are invested with the power of laying embargos, and for that purpose,

z Statutes, 27. *a* Ibid. 434. *b* Ibid. 106. *c* Ibid. 28. *d* Ibid. 223.
e Ibid 46. the

the governor with advice of council may issue a proclamation prohibiting the transportation out of the state by land or water, any article or thing, as they shall think necessary or expedient for a certain time, to be limited in the proclamation. *f* They may grant briefs, praying the charitable contribution of the people, to such persons as they judge the proper objects of charity, and without their approbation, briefs are illegal. *g* They are enabled to grant commissions of sewers, upon application made to them, by the major part of the proprietors of such lands as may be benefited thereby. They exercise the authority, every spring of appointing a day of public fasting and prayer, and prohibiting servile labour on such day. Their authority for this, is derived from immemorial usage and consent.

A day of public thanksgiving, is appointed by the legislature in the fall session, and the governor in both cases, issues his proclamation, requiring them to be religiously observed.

The lieutenant-governor, has the stile of, his honour, and has the power of justice of the peace, through the state. Each assistant has the same power.

II. Of the subordinate executive officers. And, 1. Of the Secretary. This officer is elected annually by the people, in the same manner as the governor. In the session of assembly, he performs the duty of clerk for the council, by making entries on all bills and petitions, of their votes. His office is created and his duty pointed out by statute. *h* That the secretary shall have the keeping and custody of the records, and other public papers, that contain the acts, orders, grants, and doings of the general assembly, and that relate to such matters and affairs, as are of general concern, and are to be recorded and kept in his office. He shall record all acts, grants, orders, and resolves made by the assembly, and give true copies when reasonably required. He shall within twenty days after the end of every session of assembly, publish in writing, under the seal of the state, the acts, laws and public resolves, and send them to the printer of the State of Connecticut, that they may be printed. He is keeper of the seal of the state, and is obliged to affix it to such laws, acts, orders, commissions, instruments, and

f Statutes: 18.

g Ibid. 219.

h Ibid. 218.

f Statutes: 1

and certificates, as he shall by law be ordered to do, or shall be desired by particular persons, who have occasion therefor.

2. Of the Treasurer. He is elected annually by the people, in the same manner as the secretary. And has the superintendence and care of the revenues of the state. The public revenue consists in the annual grant of taxes by the assembly, the duties upon writs, fines, and forfeitures for public offences, inflicted by the superior and county courts. The monies are all to be paid into the hands of the treasurer, who deposits the same in the treasury, which is under his care and management. He is obliged to keep a regular account of the public taxes, and monies which he receives—and his accounts are annually audited by persons appointed for that purpose by the assembly. He must become bound with surety, in five thousand pounds lawful money, to the state, for the faithful discharge of the duties of his office, and to render his account when required. Which bond is to be taken by the governor and council, and to be registered and kept by their clerk. The secretary, and clerk of the superior court are bound annually to give him an account of all the fines and forfeitures belonging to the state treasury, and he may issue his warrant to the sheriff for their collection.

It is provided by statute, that all demands against the state, not first liquidated and allowed by the general assembly, or by the governor and council, or house of representatives, or supreme court of errors, or by the superior court, or by a court of common pleas, by virtue of some express law, shall be liquidated and settled by the comptroller, who shall give orders on the treasurer to authorize him to pay the same.

When the assembly grant a tax, it is the duty of the treasurer to issue a warrant within three months before the tax is payable to the constables, who are collectors in the several towns, commanding them to levy and collect the same according to law.—Upon their failure, within four months after the tax, has become due, he is impowered to issue a distress to the sheriff of the county where the collector dwells, to collect the same of such negligent collectors.

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1 Statutes.

1 Statutes, 383.

1 Statutes, 375.

The treasurer at the request of the selectmen of any town, may issue an execution in their name, directed to the sheriff of the county or his deputy, against a collector, at any time after the tax becomes due, that the money may be collected for the indemnity of the town, who are to pay the same to the treasurer, within four months after the taxes become payable, and on failure, execution is to issue against the persons and estates of the selectmen, and the inhabitants of the town.

Where no application is made by the selectmen to the treasurer, for an execution against the collector, and the execution issued against him is returned non est, or he becomes insolvent, then execution may go against the town. These proceedings are pointed out by statute, and the nature of these elementary enquiries will not permit a further discussion of this subject.

3. The comptroller, is appointed annually by the general assembly. He superintends and liquidates the public accounts. His office is created and his duty pointed out by statute, but as it is continued only from year to year, and is not considered as a permanent office, it will be unnecessary to consider it more minutely.

4. The sheriff is an officer of great importance in the executive department of government. The office is derived to us from England: but the power of it depends on statutes, which have considerably varied it from what is in England.

There must be a sheriff in every county, he is appointed by the governor and council—he must become bound before them, with two sureties, who are freeholders, in a recognizance of one thousand pounds lawful money, to the treasurer, for the faithful administration of his office. He receives a warrant from the governor, or in his absence from the lieutenant-governor, empowering him to execute his office. Any person may be appointed to this office, and no person is subject to any penalty, for refusing to accept an appointment. The office is held during good behaviour. The governor and council may displace him upon proper reasons, and he may resign his office at pleasure.

^m Statutes, 223.

The sheriff is considered as the principal officer in the county, and has great and extensive authority. It is his duty and in his power to preserve the peace of the county, and to suppress all tumults, riots, routs, and unlawful assemblies, by force and strong hand. He may officially and without warrant, apprehend all persons whom he shall find in the disturbance of the peace, and them carry before proper authority. He may command all proper persons within his county, to aid and assist him in the execution of his office. This is the same power that they have in England, and is called raising the posse comitatus, or power of the county.

In case of great opposition, or where he has reason to suspect it, he may with the advice of one assistant or justice of the peace, or more if they be present, raise the militia in the county, or so many of them as they shall judge needful, who are bound to yield obedience. The sheriff being invested with sufficient power to execute his office, and it being absolutely necessary, for the existence of government, that he should execute his office, he shall not return that he cannot do execution. The sheriff is bound to read the riot act, in all cases of riots.

He is authorised to serve and execute all lawful writs, to him directed, by lawful authority, and the power of water bailiff, is annexed to his office. He is bound to receive all lawful writs, when they are tendered to him within his county, and make return according to law, and the direction therein given : he must give a proper receipt for all writs, if demanded, and a receipt be presented without fee or reward, and on refusal, other persons may set their names to such receipt, as witness to the delivery. On neglect to execute or making false return, complaint may be made to the court or justice, to which such writ was returnable, who may enquire into the facts, set a suitable fine on the sheriff, and award just damages to the party injured. This statute gives all courts original and final jurisdiction, on all receipts for executions, granted on judgments, by them rendered.

The sheriff is by his office, chief keeper of the goal in the county, and has the charge and custody thereof, and may appoint such

keepers under him as he shall think proper, and is responsible for any damages that any person may sustain, by the escape of any prisoner from goal, by the fault or connivance of such keepers, or any other person that has the charge of said goal under the sheriff, and also for other faults and negligences of such under-keepers, in any matters respecting said trust.

The sheriffs have the power of constituting and appointing, a certain number of deputies, to act under them, who have the same authority as the sheriff, and who, as well as the sheriff must take the oath by law prescribed, before they are qualified to execute the office.

The sheriff has the liberty of deputing some meet person on special occasions, to serve and execute any particular process, which deputation, must be on the back of the writ, and the person deputed after serving it, must make oath before proper authority that he served the same according to his indorsement, and that he did not fill, nor direct any person to fill the same. The only instances where it is usual for sheriffs to make such special deputies, are where no legal officer can conveniently be had, or the person against whom the writ is, secretes himself, and keeps himself out of the way of known officers. In such cases, he deposes some person for that special purpose, so that there be no failure of justice. The sheriff or his deputy, may not draw, or fill up any writ, process, or declaration, nor appear as attorneys.

It is the duty of the sheriff to attend on all the stated courts within the county, to preserve good order in the court, and to execute their judgments. In all matters of a criminal nature, it is his duty to carry the judgments of the court into execution, by inflicting such punishment as they order.

5. Justices of the peace, may be considered as having some share of executive authority. It is their duty to conserve the peace of the county. When riots happen, they have power to read the riot act, and command the rioters to disperse. In case of disobedience, they have right to apprehend the offenders, and command any person to assist. The sheriff must take their advice in raising the

the militia to quell riots. They, with the selectmen, constables, and grandjurors, nominate tavern-keepers. But their authority is chiefly of a judicial nature.

6. Goal keepers are appointed by the sheriff, for the immediate keeping the goal, and securing the prisoners. There are many other executive officers in the lesser divisions of the state, such as town and society officers—these will be considered, when we come to treat of towns, and societies, which are reserved for a special consideration, in the course of these enquiries.

CHAPTER FOURTH.

OF THE JUDICATIVE POWER.

THE jurisdiction of courts of law is precisely defined, and limited by statute. We are perplexed by no disputes on this subject, and have occasion only to exhibit the several courts, from the highest to the lowest, by a concise abridgment of the statutes.

I. The Supreme Court of Errors, consists of the governor, lieutenant-governor, and council; in which the governor presides, and in his absence the lieutenant-governor, or if he be absent, the senior assistant present. Eight of the council constitute a quorum. This is the highest court of law in the state, and is the dernier resort in all matters of law and equity, brought by way of writ of error, or complaint from the judgment, or decree of the superior court, wherein the rules of law, or principles of equity, appear from the files, records, and exhibits of said court, to have been mistakenly adjudged, and determined. This court is holden alternately at Hartford, and at New-Haven, the first Tuesday in June. The secretary is their clerk. It is the duty of this court, to commit the reasons of their judgments to writing, which are to be signed by one of the council and lodged in the office of the clerk of the superior court. This court was instituted in 1784, previously to which time, the general assembly was the last resort.

II. The Superior Court consists of five judges, appointed annually by the general assembly. This annual appointment of the judges of the superior court, is the most exceptionable practice adopted in the state. Judges have no power to frame laws—they

can only expound them. They can have no temptation to extend or misconstrue the law, to the oppression of the people, because they can derive no benefit from such misconduct. The responsibility of the legislature to the people, is the security that good laws shall be made; but the judiciary are placed on a different basis. The security that they shall expound the laws justly, is their independence. Secure in their places, they can have no bias to deviate from the principles of justice, and they will equally resist the insolence of power, or the caprice of the people. They will equally regard the rich, and the poor. But, if they must court the favour of the legislature, or the smiles of the people to preserve their offices, such will be their state of dependence, that they may insensibly be led in their decisions, to bend the principles of justice, to a calculation of securing the favor of the persons most influential in their appointments. In this state it is apparent that where a case comes before the superior court, for trial between an influential character, who is usually a member of the legislature, and a poor man without influence, the judges have not that independence of situation, which is necessary to enable them to form an impartial decision. There is danger of the operation of a bias on their minds, to which they ought not to be exposed by the nature of their appointments. As they can have no inducement to extend their power, let them be independent, and they have no inducement to swerve from justice.

They ought to be appointed during good behaviour, and removable on impeachment for corruption, and misbehaviour. This will be a sufficient guard against mal-administration: but to avoid inconveniencies of another nature, it would be proper to declare that they should not hold their offices after they arrive to a certain age, and that such a state of infirmity as precluded the performance of official duties, should vacate their seats.

• Their jurisdiction extends thro the state. They hold their courts in, and perform circuits thro every county. They possess a four-fold jurisdiction. They hold pleas of certain crimes. They have appellate jurisdiction in certain matters of a civil nature, from the courts of common pleas, and courts of probates. They have original jurisdiction in all matters of equity, where the sum exceeds one hundred pounds, and is less than sixteen hundred. They have jurisdiction

jurisdiction by writs of error from the judgments and decrees of the courts of subordinate rank. I shall treat of each branch of jurisdiction.

1. The criminal jurisdiction extends to all crimes, the punishment of which relate to life, limb or banishment, and to other high crimes, and misdemeanors, and to adultery. They have by statute jurisdiction of the crimes of blasphemy, atheism, polytheism, and unitarianism. Of robbery, burglary, forgery, counterfeiting, and horse-stealing. The expression of high crimes and misdemeanors, is of uncertain meaning, but the court have judged that under misdemeanors, they have cognizance of all crimes where the common law punishments of fine, imprisonment, and pillory are inflicted, so that they denominate the offences, misdemeanors at common law. * They have determined that they have cognizance of perjury.

2. The appellate jurisdiction is from the courts of common pleas, and courts of probate. Appeals lie from the courts of common pleas in all cases, wherein the title of land is concerned, or the value of the debt, damage, or matter in dispute, shall exceed the sum of twenty pounds; excepting it be a bond, or note, vouched by two witnesses. It has been adjudged that the sum demanded in the writ, shall not be the rule of determining the jurisdiction; but that the court will look into the declaration and pleadings, and if from the facts stated it is apparent that according to the rules of ascertaining damages, judgment cannot be rendered for a greater sum than twenty pounds, the appeal cannot lie: but where it may be a discretionary matter with the jury to find greater, or less damages, the appeal must be sustained. † In an action on book, the plaintiff averred that twenty pounds was due, and demanded twenty-five pounds, the court adjudged that no appeal would lie, because the plaintiff could not recover more than the sum he said was due, which was but twenty pounds.

‡ In an action on note for fifty pounds, which appeared by the pleadings to be an arbitration note, and that the award was, that the defendant should pay the plaintiff eighteen pounds only, judgment being rendered by the county court for that sum, an appeal was taken, but abated by the superior court, because neither the

original

* Kirb. Rep. 106.

† Ibid. 35.

‡ Gates vs. Jones. S. C. 1291

original matter of controversy, nor the award, amounted to twenty pounds, and the award was the only matter in dispute. In an action on book, demanding thirty pounds, the book produced was for less than twenty pounds, and the county court refused an appeal, but on writ of error, judgment was reversed. The defendant in error offered to produce a certified copy from the clerk of the county court, where the book was lodged on file, that it was for less than twenty pounds, but the court said they could not take notice of it, unless it was made parcel of the record.

f It has been adjudged that if a note or bond for money only, be witnessed by two witnesses, and at the time of trial, either of the witnesses be dead, or become interested, so as to be excluded from testifying, that appeal will not lie; because by the reason of the death, or interestedness of the witness, the note or bond cannot be vouched in court by two witnesses.

• No appeals lie upon defaults, unless there was a hearing in damages, for otherwise the party is not supposed to be in court; but from every sentence by which the party is aggrieved, if he be in court, appeal lies, as from a judgment rendered upon *nihil dicit*.
• No appeal lies to an adjourned court.

It has been determined that no appeal lies from the court of common pleas, in a *qui-tam* prosecution, for any crime, let the matter in dispute be of ever so great amount. * Formerly it was held that if the defendant was acquitted, the prosecutor should not be allowed an appeal, because no person shall be brought in jeopardy twice for the same crime: but if he was convicted, it was supposed that as the prosecution was of the nature of a civil action, he had a right to an appeal, if the sum in dispute exceeded twenty pounds. But in a late case of *Gilbert against Stedman*, the superior court decided that the defendant on conviction, had no right of appeal, and this judgment was affirmed by the supreme court of errors.

Appeals in all cases must be taken during the session of the court from whence the appeal is taken, bond with surety given, and the duty of six shillings paid. The appeals must be entered before the second opening of the court to which they are taken, unless the
appellant

• *Nelson vs Hammond*. S. C. 1793. *f* *Ripley vs. Fitch*, S. C. 1792.
Kibb. Rep. 17. * *Ibid.* 366. * *Ibid.* 269.

appellant shall before the jury are dismissed, pay to the appellee all his cost in such case arisen to that time, which shall not be refunded, however the case may finally issue. But if the appellant do not enter the appeal, before the jury are dismissed, the appellee may afterwards, and have the judgment of the county court affirmed, with additional cost.

Appeals lie in all cases from the determinations of courts of probate, unless it be a judgment accepting the report of commissioners, in allowing the claims of creditors, to an insolvent estate, in which case it has been adjudged, that no appeal lies excepting the administrator be a creditor, and has an allowance made. In such case it has been determined that an appeal lies, because no person can contest his account at law, as he can the accounts of all other creditors. No appeal lies from a judgment on a report of auditors.

3. The superior court has jurisdiction of all matters in equity, that exceed one hundred pounds, and are less than sixteen hundred pounds, by petition originally preferred to them.

4. A most extensive branch of jurisdiction arises from writs of error, from the courts of common pleas, and justices of the peace. From all judgments of the common pleas and justices of the peace, a writ of error will lie to this court, for any error in law or equity, apparent on the face of the record. Error may be brought in all criminal cases, if it appear on the record. The time of bringing writs of error, is limited to three years.

This court has jurisdiction in all actions, that are necessary to carry their judgments into execution. Writs of scire facias on their judgments, and suits against officers who neglect to serve executions issued by them, may be brought directly to this court.

5. They have power to grant bills of divorce to married persons pursuant to statute : but this subject will be fully considered when we come to treat of husband and wife.

6. The superior court and in vacation, the chief judge, or any two assistant judges, upon complaint made to them, that any other court do exceed their jurisdiction, or hold plea in any matter of which, they have not cognizance by which the person suggesting is grieved, are empowered to grant a writ of prohibition, by them

subscribed as well to the party prosecuting, as to the judge of the court, who exceeds his jurisdiction, prohibiting them from proceeding any further, and the court is impowered to proceed from time to time thereon, and render judgment, and award cost according to law.

This writ is grounded upon a complaint from the defendant, stating the cause of action, and shewing that the inferior court exceed their jurisdiction, and are incompetent to try the action of which they claim cognizance. It is directed to the court as well as to the party prosecuting. If such inferior court are satisfied when they receive the prohibition that they have no jurisdiction of the action, they stop their proceedings; if not, then they make a return of the action to the superior court, which will be considered as a true return, on which the superior court will decide the right of jurisdiction. If they are of opinion that the inferior court had not jurisdiction, the judgment is that the prohibition shall stand; if otherwise, they grant a writ of consultation, which is a permission to proceed in the prosecution and decision of the action.

7. The superior court have decided that they have the common law jurisdiction to issue writs of mandamus to inferior courts and officers, to restrain them within proper bounds, and to oblige them to execute that justice, which their duty requires. * They ordered a mandamus to issue to a town-clerk to record a deed. The party who moves the court for a mandamus, must state the facts necessary to support his motion, and make oath to their truth. Notice must be given to the adverse party to shew cause why the motion should not be granted. The first writ that issues, is a command to the officer or court to do the thing required, or return a sufficient excuse for not doing it. If the officer or court return an excuse which is deemed to be sufficient, the process is at an end: but if it be adjudged insufficient, then a peremptory mandamus issues, and if the officer to whom it is directed disobeys, he is punishable for a contempt of their authority, and they will grant an attachment to take and imprison him, till he obeys the order. Where a false return is made, the party injured, by the common law must have recourse to his action, in which large damages are given, if the return is found to be false.

By

* Kirb Rep. Strong's case 345

By a statute in Great-Britain, of the 9th of Anne, the complainant has a right to traverse the return, which is tried by a jury, and if found against the officer, a special mandamus issues and damages are also given to the complainant. In this state, in Strong's case, the court directed that the statute of Anne, should be the rule of proceeding in trying the sufficiency of the return of the mandamus : but the contest was settled without a trial of the return.

8. The writ of habeas corpus, is a valuable privilege of the citizen, and is demandable of common right, for any person imprisoned under colour of authority, or without it, except the imprisonment be on execution, or on conviction of some crime. The superior court grant this writ, which must be directed to the person who has the custody of the complainant, with a command to bring him before the court, with the cause of his detention. This writ lies in favour of a wife confined by her husband, or for a servant, or child confined by their parents or masters. It will also lie in all cases of imprisonment by legal process, excepting on execution, and on conviction of crimes. When the person is brought forward before the court, with a return of the cause of his detention, the court will examine the matter, and if the detention be illegal, they may discharge him, or otherwise remand him to prison. When the court is not sitting application may be made to the chief judge, or in his absence to one of the assistant judges. If a husband should confine his wife, after she had been discharged by order of the court, he may be committed for the contempt.

The superior court has stated terms in every county, and the chief judge, or in his absence, any three of the other judges are empowered to call a special court, upon extraordinary occasion.—When the court cannot conveniently be held at the time or place appointed, any three of the judges may adjourn it to any other time or place in the county, or continue the actions therein pending, to the next stated term, giving notice to the sheriff under their hands, who shall proclaim and publish it in such manner as they shall direct. If any judge be present at the place and time for opening of the court, he may open and adjourn it. If none are present, the sheriff may adjourn till the next day, till the judges arrive.

When by absence of any of the judges or legal exception to them, there shall not be a sufficient number to hold the court, to try any case, the place may be supplied by any of the assistants. They have power to appoint and swear a clerk, and an assistant clerk, who shall have power to do every thing the office requires. The presiding judge in case of an equi-vote, has a casting voice.

The superior court on complaint, have power to disfranchise a freeman, for walking scandalously, and committing scandalous offences, and on reformation, may restore him. This power is too general, and the description of the crime too vague. It were better to designate the crimes, for which a freeman might be disfranchised, and not leave too much to the arbitrary opinion of a court.

It is the duty of the court in all matters of law, by them decided, on writ of error, demurrer, special verdict, or motion in arrest of judgment, that each judge shall give his opinion seriatim, with the reasons, and reduce the same to writing and subscribe it, to be kept on file, that the case may be fully reported, and if removed by writ of error, be carried up with greater advantage, and thereby a foundation be laid for a more perfect and permanent system of common law.

III. The courts of common pleas, or county courts are next in order. 2 These have two stated terms, or sessions annually, and may be adjourned as often as convenient, and called together as often as necessary. They consist of one chief judge and four justices of the quorum, who are annually appointed by the general assembly. In absence of the judge, the senior justice present presides, and either three make a quorum: in case of absence, or exception to the judge or justices, so that there be not a sufficient number to proceed, their places may be supplied by any of the justices of the peace in the county. They appoint a clerk who is sworn, and has power to grant attachments, summons, and replevins, to grant executions on judgments, and keep their records. In cases of an equi-vote, the presiding judge has a casting voice.

The jurisdiction of this court, comprehends matters of a criminal, of a civil, and of an equitable nature.

I. The

1. The criminal jurisdiction by statute, extends to all crimes where the punishment does not relate to life, limb, or banishment, or adultery. These general terms would give them concurrent jurisdiction in sundry matters with the superior court; but perhaps the true distinction is, that the courts of common pleas have cognizance of all crimes beneath the jurisdiction of the superior court, excepting in cases where the statute gives concurrent jurisdiction, as for the crime of horse-stealing.

2. Civil actions principally originate before this court; they have therefore power to hear, examine, try, and determine, by a jury or otherwise, all civil causes, real or personal. All actions that exceed the jurisdiction of justices of the peace, are originally brought to this court. In all actions originally brought before justices of the peace, they have appellate jurisdiction, where the sum demanded exceeds forty shillings, and the bond or note is not vouched by two witnesses. They have final jurisdiction, unless by writ of error, in all cases wherein the value of the debt, damage or matter in dispute, does not exceed twenty pounds, and all actions on bonds, or notes for money only, vouched by two witnesses. No appeal lies in a suit against an officer for not serving an execution, or on a receipt for property on which execution was levied.

3. The equitable jurisdiction extends to all cases, wherein the matter in demand does not exceed one hundred pounds. A justice of the peace has no power in matters of equity, and the statute has fixed no sum, below which a court of equity cannot grant relief. No appeal lies in matters of equity, but writs of error may be brought to the superior court.

4. The courts of common pleas in their respective counties, have the superintendence and guardianship, of all idiots, distracted, or impotent persons, that have any estate, and may order and dispose of it, in such manner as they shall judge best for their support, and put the persons to some proper labour, or service, at the discretion of the selectmen, or they may appoint conservators to the persons and estates, of such idiots, distracted, and impotent persons,

to

to provide for their support, and be accountable to the court for the management of their trust, when required : and on failure of personal estate to defray the expense of their support, the court may order a sale of the real estate.

5. The courts of common pleas in each county, and grandjurors there present, have power annually to grant and levy a tax as necessity may require, upon each town in the county, upon the lists of such year, to pay the debts and necessary charges of the county, which cannot be paid out of the fines and perquisites allotted for that end.

6. ^b The courts of common pleas have the power of admitting attornies to practice. In this state there are no grades in the profession, all of the profession, are called attornies, and when admitted by the court of common pleas in one county, may practice in every court in the state. The statute enacts, that the county courts in each county, may approve, nominate and appoint attornies, as there shall be occasion, to plead at the bar ; who shall take an oath before the court, and a record by the clerk shall be sufficient evidence of the admission. If they transgress the rules of pleading, established by the court, they may be fined not exceeding five shillings. They are to be under the direction of the court, before whom they plead, and for just reason may be suspended or displaced.

No person, except in his own case, is admitted to make any plea at the bar, in any court, unless qualified and admitted as an attorney according to law. This law has not been supposed to extend to justices of the peace, and before such courts, persons have been allowed to advocate causes, tho not qualified attornies. Where the title of land is not concerned, and the demand is not above ten pounds, one attorney on a fide only is allowed to plead : and in all other cases, two and no more. There is no attorney-general in the state, but in every county, the court of common pleas, appoint an attorney for the state, who is to prosecute all cases in the county, in behalf of the state, both in the superior and county courts.

By the consent and practice of the courts and attornies, the
mode

^b Statutes, 10.

mode of introduction to the bar has been, that the candidates for admission, apply to the gentlemen of the bar, who either by themselves, or a committee appointed for that purpose, examine them with respect to their qualifications, in point of knowledge of the law and fairness of moral character; and if they find them possessed of competent legal science, and of fair moral characters, they recommend them to the court, who direct the clerk to administer the oath by law provided. But otherwise, the bar will refuse to recommend them.

A rule has been introduced by the agreement of the attorneys in the several counties, that every candidate, whose education has been liberal, must serve as an apprentice, two years with some practising attorney, and every candidate, whose education has been common, must serve an apprenticeship of three years, with some practising attorney, before they are entitled to an examination, with respect to their qualifications, to be admitted to practice.

7. Courts of common pleas have power to lay out new highways, or alter old. The person making application, must give twelve days notice to the town, where the highway is, by causing a citation to be served on one or more of the selectmen. If no objection is made, or the objection is adjudged insufficient, the court may appoint a committee to enquire into the conveniency and necessity of the highway, and if found convenient and necessary, they may appoint a committee of three freeholders, to view and lay out, or alter the same, who must be sworn, must give notice to the selectmen, and twenty days warning on the sign-post; they must lay the highway in the most convenient place, estimate the damages done to each person, and make return to the court, which being approved and recorded, the highway is established. The town where the highway is, must defray the expence, and on failure, a *scire facias* may be issued against the selectmen, and if no sufficient cause is shewn, execution may be awarded, with additional cost. If any individual is aggrieved by the doings of the committee, in laying out the highway, or estimating the damages, the court, before the acceptance of the report of the committee, may enquire into the matter complained of by a jury, if the party aggrieved desire it and grant such relief as the case may require: but if such application

application is groundless, the court may render judgment, and grant execution against the party applying, for the cost. The application for a jury, is the only mode in which individuals, who are affected by the laying out a new, or altering an old highway, can seek for redress : till that time, the controversy is between the petitioners, and the town : of course the court cannot have a discretionary power to grant a jury : the party aggrieved may demand it of right, and the court cannot refuse it. When a statute says, that a court may do a thing, it does not give them a discretionary power ; but the word *may*, is of the same legal import as *shall*.

A question has arisen with respect to the power of the court to alter highways. This distinction has been taken, that the court may alter, but cannot discontinue a highway. ^c In a certain case the county court laid out a new highway, and discontinued an old one, which passed by the house of a person, and who by the discontinuance, was shut from a public road. He brought his action against the man, who claimed to be the proprietor of the land, and who erected a fence, for a nuisance, in obstructing the highway, which was sustained by the superior court, on the principle, that the county court had no power to discontinue the old highway.

IV. Courts of probate, are constituted within certain districts, are held by one judge appointed annually by the general assembly, with the power of appointing a clerk. ^d Their jurisdiction comprehends the probate of wills and testaments, the granting of administration, the appointing, and allowing guardians, and the acting in all matters of a testamentary and probate nature. In any difficult or disputable case, the judge has power to call in to his assistance, any two or three of the justices of the quorum, in that county where the dispute arises. The judge has the power of fixing the place of holding his courts. In all cases, an appeal lies to the superior court except from a decree, accepting the report of commissioners, and then if the administrator be a creditor to the estate, and has a debt allowed him. The person appealing must give sufficient security to prosecute his appeal to effect. All persons that are of full age, and present, or have legal notice to be present at the court of probate, that shall give the judgment, sen-

tence

^c Allen vs. Lyon, S. C. 1795.

^d Statutes, 31.

tence, determination, denial, or order, must appeal to the next superior court. All other persons in this state, or the states of New-Hampshire, Massachusetts, Rhode-Island, New-York, and New-Jersey, and of full age, at the time the court passes the decree or order, shall within eighteen months afterwards, or within eighteen months after coming of age, into this state, enter their appeal from such decree or order.

On appeals from the court of probate, it is in the province of the superior court, to fix the principles of the law, for the direction of the court of probate, but are not authorised to proceed through all the forms to a compleat settlement, as a prerogative court. The execution of the law, as ascertained by the superior, appertains to the courts of probate.

V. Justices of the peace, have jurisdiction both in matters of a criminal and civil nature. They are appointed annually by the general assembly, commissioned by the governor, and sworn: as their principal duty consists in preserving the peace and good order of the county, there is a proper number appointed in each town, whose jurisdiction extends through the county.

1. Their jurisdiction in criminal cases, extends to crimes where the penalty does not exceed forty shillings. And appeals lie to courts of common pleas for all crimes, but those respecting keeping taverns without licence, and selling lottery tickets granted by another state, drunkenness, prophane swearing and cursing, and sabbath breaking, and of these three last crimes, the ocular view of a justice or an assistant is sufficient evidence to found a conviction upon, and they may issue their warrant, apprehend the offenders, bring them before them, and convict on their knowledge. *f* He may also by the common law officially bind those to keep the peace who in his presence make an affray, who threaten to beat, or kill another, quarrel, or go about with unusual weapons, to the terror of the people and such as are brought before him by the sheriff or constable for a breach of the peace in their presence. But in all other cases presentment must be made by an informing officer.

The power of justices of the peace, is not so expressly defined

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respecting

f Kirb. 284.

f Hawk. P. C. 126:

respecting corporal punishments, as pecuniary penalty ; they can however, inflict no corporal punishment, but whipping, setting in the stocks, and imprisonment. For the crimes of drunkenness, and prophane swearing, they may set the offender if he has not estate to pay the fine, in the stocks. For the crime of sabbath breaking, they may order the offender to be whipped, on his neglecting to pay the fine : and for stealing, if within their jurisdiction, they may inflict the punishment of whipping. An indian, negro, or mulatto servant, guilty of a breach of peace, may be by them punished with whipping, not exceeding thirty stripes. They may send to the house of correction, certain offenders, described in the statute respecting rogues and vagabonds, which will be fully considered when we treat of crimes. They may imprison for a contempt of court, or bind to the peace and good behaviour. They may grant sureties of the peace and good behaviour, against persons who disturb the peace, and on their refusing to find sureties, may commit them to goal.

When the offence is not determinable by a justice of the peace, he has power to recognize the offender, if the offence be bailable, with surety to appear before the court that has jurisdiction, and for want of bail, or if the offence be not bailable, he may commit the offender to goal. Hence it has become a common practice for grandjurors to present their informations, to justices for all offences : who cause the offenders to be apprehended, and proceed to make enquiry, and if there be probable evidence of their guilt, they recognize them to the proper court for trial ; if there be no probable evidence against them, they are dismissed.

§ If a justice of the peace find the evidence against the person complained of, to be insufficient to authorize him to bind him over to a court that has cognizance of the offence, he cannot subject him to the payment of cost ; for not having jurisdiction of the offence, he cannot render judgment for the payment of cost. And the law does not intend, that a person should be subjected to the payment of cost, where there is not sufficient evidence to hold him to trial.

Justices of the peace, have power to issue warrants, to be served in any part of the state, to apprehend and bring before them,

any

any person against whom complaint is made, of committing a crime, for which he ought to be brought before them for trial, or examination. He may likewise grant summons, or *capias* for witnesses in like cases. Any sheriff, deputy-sheriff, or constable, to whom such process, summons, or *capias* shall be directed by name, and office, may serve it in any part of the state, where the person cannot be found in the official precincts of such officer. The authority may grant such precept if he judge necessary, to some suitable indifferent person, who shall have the same power to serve it as the legal officer. In all *qui tam* prosecutions, where the offence or demand exceed the jurisdiction of the justice, he has a right to recognize the defendant before the proper court for trial, upon the same principles as are laid down in public prosecutions.

2. The jurisdiction of justices of the peace, in matters of a civil nature, renders the office of much more importance in this state than in England, where they are confined to criminal cases.— Their civil jurisdiction often renders it necessary, for them to determine questions of as much difficulty, as any that occur before the highest courts. It behoves a justice, who wishes to execute with fidelity the trust reposed in him, to become acquainted with the whole system of jurisprudence, and the general assembly ought to be extremely cautious about the qualifications of the persons they appoint. They ought to possess not only ability and knowledge, but candour and impartiality, above the influence of intrigue, and the prejudice of party.

Justices of the peace, have jurisdiction in all cases wherein the title of land is not concerned, and wherein the debt, trespass, damage, or other matter in demand, do not exceed four pounds, or if the action be on bond, or note, given for the payment of money, or bills of credit only, vouched by two witnesses, and the sum demanded does not exceed ten pounds; if the sum in demand exceed forty shillings, an appeal lies, except in actions on bonds and notes. A question has arisen, whether a note for more than ten pounds, could be indorsed within that sum, and no more than that sum demanded, so as to bring it within the jurisdiction of a justice; but it has been determined, that the face of the note gives the jurisdiction, that an indorsement cannot alter it, for that may be a part of

the dispute, nor can a party wave part of his debt, to lessen it to the jurisdiction of a justice ; this ascertains the jurisdiction, and one party shall not alter it without the consent of the other. No appeal lies to an adjourned court. Bonds or notes vouched by two witnesses, and under ten pounds, if either of the witnesses should become interested, or die, will not be within the cognizance of justices, upon the principle adopted respecting appeals.

b A justice of the peace has no jurisdiction to try an arbitration note, if more than four pounds, tho less than ten pounds, and vouched by two witnesses, because the sum of the award is the rule of damages, and the note is not for money only, but in the nature of an escrow.

When an action of trespass is brought before a justice of the peace, and the defendant justifies by a plea of title, the facts shall be taken as confessed, the justice shall make a record of it, and take a recognizance of the defendant, that he will pursue his plea of title to the next county court, and shall certify the same to the court with the whole process.

i In all actions brought before justices of the peace, for raising or obstructing the waters of any stream, river, arm of the sea or creek, by the raising or continuance of any mill dam, or other obstruction, in which the defendant shall plead, that he has right to do the act ; an appeal lies from the judgment of the justice of the peace, to the next county court, upon giving good and sufficient bond with sureties, to prosecute the appeal, and in like manner, to the superior court.

A justice of the peace, has power to take and accept the confession and acknowledgment of any debt, not exceeding twenty pounds exclusive of the cost, from debtor to his creditor, either upon or without any antecedent process, as the parties shall agree, which can be done only by the debt or in person. Of which confession the justice must make a record, and may grant execution. *k* It has been determined that the judgment should express the particular debt or duty, about which it is conversant, as bond, note or book, that the judgment may be a bar to an action brought for the same thing ; *l* and that

b Desborough vs Desborough, S. C. 1789.

i Statutes 479.

k Kirb 152. *l* Ibid. 236.

that the judgment must not be for more cost than his own fee, unless upon an antecedent process which must appear of record.

* It has been adjudged, that a justice of the peace cannot take a confession on an arbitration note, for he is to take confession only in case of a just and liquidated debt; if the confession of judgment upon arbitration notes be admitted, the party can have no day in court to object against the award, let it be ever so irregularly made.

o It has been adjudged by the superior court, that a justice of the peace cannot go out of the town in which he dwells, to try a cause, unless there be no justices of the peace in such town, who are legally qualified to try the same.

The jurisdiction of justices of the peace, extends to the execution of the statute, directing proceedings against forcible entry and detainer: two assistants, or two justices, one being of the quorum, or one assistant and one justice, have the authority to enquire by a jury of forcible entries and detainers, of houses, lands, tenements, and other possessions, and cause the person who is forcibly disseized or held out of possession, to be re seized.

Justices of the peace may administer the oath prescribed by statute, to poor debtors. If a justice of the peace, render a judgment, and before the same be satisfied, or execution granted, be removed by death or otherwise, the person in whose favour the judgment is, may bring action of debt at any time within five years, before an assistant, or justice of the peace, if it does not exceed ten pounds, if it exceeds ten pounds, the action must be brought to a higher court.

Justices of the peace are considered as the civil authority of the town, in which they dwell, and have extensive power in directing and advising about the management of the affairs of the town, which will be considered in the proper place. There are many other smaller matters within the jurisdiction of justices, as mentioned by the statutes, but which cannot be enumerated in an elementary treatise.

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* *Curtice vs. Bulkley*, S. C. 1791 . o *Palmer vs. Palmer*, S. C. 1797.

A distinction is made between their judicial and ministerial office. In trying causes, they act judicially. In taking depositions, acknowledgments of deeds, and many other matters, they act ministerially.

This concise account of our courts of justice opens a prospect that must excite admiration and applause. The beautiful gradation from the lowest to the highest, the certain limits and bounds of their respective jurisdictions, the smallness of their number and the simplicity of the whole institution, exhibit, the most excellent system for the administration of justice, that has hitherto been adopted. From the supreme power the streams of justice issue, and are distributed through every part, and to every individual of the state. Justices of the peace are appointed in every town, to decide and settle the inferior controversies between the people. From their courts, appeals lie to the courts of common pleas, in each county. These courts besides this appellate jurisdiction, have original jurisdiction in all cases of higher importance. To avoid unreasonable delay, and that the expence of trial, may not surmount the value of the matter in dispute, all actions of a certain description are finally tried, and determined in these courts. But in actions of greater magnitude, and for the purpose that uniform justice may be diffused, and established thro the state, appeals may be taken to the superior court, which presides over the state, and holds courts in every county. By this method the same rule of right and the same principles of justice, are distributed to all the citizens, and the laws become uniform, consistent, and universal. That questions of law may be settled with the utmost precision, and solemnity, writs of error lie from this court to the supreme court of errors. To this court nothing appears but the facts as stated, and considered in the pleadings, which gives them the fairest opportunity to investigate, and decide the abstract principles of law, without that bias and prejudice which imperceptibly operate upon the minds of courts, who are equally concerned at the same time in the discovery of the truth of facts, and the determination of points of law.

This slight view of the system of our courts, must convince every
person

person that it is the best calculated to avoid delay, and expence, and at the same time furnish the parties a fair, and reasonable chance to obtain justice, of any institution in the power of human wisdom to devise. That suits will be attended with expence, and that delays will sometimes necessarily happen, cannot be denied. A thousand causes will intervene, to render delays justifiable, and create expence. But if this delay does not arise necessarily from the institution, but is admitted, and calculated to promote justice, by giving a fair opportunity to prepare for trial, it cannot be deemed a fault, but must be acknowledged to be an excellence. In this state no delays arise from the institution of our courts, which the party can take advantage of, to put off the trial, tho not necessary to enable him to prepare for it, as is the case in England, and most other countries. But every action comes regularly to trial, at the term to which it is brought, unless good reasons can be given to induce the court to order a delay. In the administration of justice, it is true that unnecessary and unreasonable delays, may happen, but this must be attributed to the imperfection of human judgment, and not to any defect in the institution. But it is easy for by-standers who view only the superstructure, without understanding the groundwork, to censure as faults, what they would admire as beauties, if they could comprehend the whole plan. So mortals, who have but a partial prospect of the system of the universe, consider that to be evil, which 'if they could fathom the councils of eternity, they would pronounce the most perfect good.

CHAPTER FIFTH.

OF COUNTIES.

THE state is divided into eight counties for the more convenient administration of justice. ^p In every county town, court houses and goals, must be erected and kept in repair. The assistants and justices of the peace in the several counties, are empowered to tax the inhabitants, for building, repairing, and furnishing the court houses and goals : and are from time to time, to order, direct and

take

^p Statutes. 89.

take care of the goals, and keep them in repair. The county courts may appoint collectors in the respective towns, who for refusing to accept the office, are subjected to a penalty of forty shillings; and the collectors have the same power and fees, as the collectors of state taxes, and failing to make collection and payment, the treasurer of the county may issue his warrant to some proper officer, to levy and collect of them, such sums as may be due.

All persons committed to goal for any crime, must, if they have estate, defray the expence; if not, may be disposed of in service for that purpose. All prisoners are permitted to provide what food they please, and send for it where they please, and to use bedding, linen, and other necessaries as they think fit, neither shall the goal keeper demand greater fees for commitment, discharge, and chamber room, than what is allowed by law: and for any offence therein, he shall pay treble damages to the party injured, and be subject to such fine as the court shall see fit to inflict. The prisoners for debt, and felons shall not be lodged in the same room, in the prison, and if the goaler or keeper of the prison, shall offend herein, he is liable to pay treble damages to the party grieved.

The county courts have power to fix and establish certain limits adjoining the prison, which constitute the liberties of the prison, and the sheriff has discretionary power, to take bonds of prisoners confined in civil matters that they will not depart the limits of the prison, and then they may be enlarged.

The county is responsible for all escapes of prisoners, thro the insufficiency of the goal; and in case there be no money in the treasury, they may tax the inhabitants, appoint collectors, and enforce the collection; ⁷ but no process will lie against the county, in any case but for an escape. The judges of the county courts may summon together the assistants and justices of the peace, the major part of whom have power to build work-houses in each county, and levy taxes to defray the expence. The county courts have power to appoint overseers, and masters of the work-houses, and to do every thing necessary to accomplish the business.

The several goals in the counties are made work-houses, or houses of correction, till work-houses are erected, and the keepers of the

⁷ Lyon vs. Sturges, S. C. 1793. 7 Statutes. 216.

the goals, or such persons as they shall appoint, are masters, or keepers of the goals, as houses of correction, with all the power of masters of houses of correction; and all persons ordered to be sent to the house of correction, are to be received, and kept in the goals, as houses of correction, till such houses are built, in consequence of this provision, no houses of correction have been erected, and the goals are used for that purpose.

The masters are to keep the persons sent to the house of correction to such labor, as they are able to perform, for the time they are ordered to continue there. To compel them to perform their tasks, or if they are disorderly, stubborn, or idle, they may punish them by putting fetters, and shackles on them, by moderate whipping, not exceeding ten stripes at a time, or may abridge them of their food, as the case may require, till they are reduced to better order and obedience. For escapes, the prisoners may be whipped, not exceeding thirty stripes.

f The state furnishes materials for the labour of those who do not belong to any town in the state; if they belong to any town, the selectmen are to provide at the expence of the town; and if they are stubborn children, or servants, their parents or masters must pay the charge of such materials, if able; each offender is allowed two thirds of his earnings for his support, and the overplus is to be accounted for by the master of the house. If heads of families are committed, the profit of their labor, or so much as the county court shall think necessary, may be applied to support their families. In case of sickness, or inability to work, the keeper must support them, and the expense is to be reimbursed by those who are bound to pay for the materials for their labor. The master, or keeper is to be allowed reasonable compensation, is to settle his accounts with the county court, and may be punished at their direction for any neglect of duty.

The county courts appoint a treasurer, who can pay out money only by their order. He superintends the collection of county taxes, and may issue warrants for that purpose. He must issue warrants for the collection of all fines and forfeitures, belonging to the county treasury, in one year after they are imposed, on penalty

of forty shillings. He must keep weights and measures in the county town, as standards for the county, to be sealed by the state standard.

The liability of counties to respond damages for the escape of prisoners, thro the insufficiency of the goal, may with propriety be considered in this place.

The statute provides, that if any person lawfully committed, shall break goal, and make his escape by reason or means of the insufficiency of the goal, the damages sustained by reason of such escape, shall be paid out of the county treasury, with a saving that nothing in the act shall be construed to prejudice, or hinder any person or persons, from recovering any expence, cost or damage of the person or persons, or out of the estate of such person or persons, who shall be aiding, or assisting in breaking the goal, or who shall escape or be aiding thereto, and when such remedy or satisfaction may be had, the county shall not be charged with, nor ordered to pay the said expence, cost, or damage.

In England the sheriff provides the goal, and of course is responsible for any escape by reason of its insufficiency. But in this state, as the county are obliged to provide the goal, the sheriff is only accountable for the custody, and the county are liable for escapes by reason of its insufficiency. It is of importance to public justice, and the peace of society, that prisoners should be securely kept. It is therefore established, as a general principle, that the county shall be responsible for all escapes by the insufficiency of the goal, that do not happen by fire, public enemies, or the providence of God. Against these, it is unreasonable to require that counties should provide. This reduces the point of insufficiency to a certainty. It will be in vain to say that the goal was erected of sufficient strength, because it appeared to be sufficient to restrain common persons, and the prisoner escaped by uncommon means. If he were able to make his escape in any other manner than by reason of fire, public enemies, or the providence of God, the law determines the goal to be insufficient.

It is therefore no excuse for the county, that the prisoner broke out

out by the help of implements handed in at the window. It is their duty to provide a sufficient goal, which they do not, if prisoners can break out of it with or without implements. If the goal is left accessible to persons without, and is of a construction and materials, that by the secret use of implements, it can be broken, it is not the place of security which the law intends. It is the sheriff's duty to defend the goal against open and riotous attempts, but it clearly devolves on the county so to build, and secure it, that it shall not be liable to be broken secretly, without the knowledge of a vigilant keeper.

If persons aid, and assist the escape of a prisoner, and have sufficient estate to pay the damages, and are known to the creditor, he must first seek his remedy against them, but if they are unknown to him, or unable to respond the damages, his challenge is directly upon the county.

The statute makes no provision in favour of the county, upon recaption by fresh pursuit. It would seem, however, reasonable, that in such cases the principles of the common law ought to apply; but if the recaption be after the commencement of the suit, it will be no excuse by the common law.

The statute enacts that the cost and damage shall first be justly ascertained and allowed, and the county ordered to pay it. Upon the idea of a just ascertainment of the cost and damage, the courts have adopted a construction, that enquiry may be made with respect to the ability of the prisoner, who has made his escape, to pay, and if he had taken the poor prisoners oath before his escape, and was wholly unable to discharge the debt, then they say that no cost, or damage has accrued to the creditor, by the escape, and that the county in justice are not liable to pay the debt for which he was confined; but if there be proof, or a probability that the prisoner could have paid all, or any part of the debt, they will order the payment of such sum as shall appear to be just and reasonable under the special circumstances of the case, and that special damages are only to be given, instead of the whole sum for which the prisoner escaping was committed.¹

The application is by a petition to the court of common pleas in the county, where the escape happened ; but if any party be aggrieved by the denial, or determination of the county court, they may appeal to the superior court, who may hear, and determine the same, and order the payment of such damages, and cost arising on the appeal, as they judge reasonable.

CHAPTER SIXTH.

OF TOWNS AND TOWN OFFICERS.

THE impossibility of collecting all the people in one body, to elect their rulers, and the difficulty of exerting sufficient energy to govern the state, while it remains a single corporation, has rendered necessary, a number of subordinate divisions. Connecticut is divided into a number of small corporations, called towns. The extent of territory, and the number of inhabitants in each, are such, that they may conveniently assemble to elect their rulers, and manage their common concerns and interest. These corporations are vested with certain powers and privileges, for their internal regulation and government. All the inhabitants convene, they have a right to elect their own officers, and possess some power of a legislative nature. Here we may behold an epitome of a pure, unmixed, democracy, and it is here, that the people have the direct and immediate exercise of their power, and privileges as freemen.

As towns are created by statute, which are clear and explicit, it will be unnecessary to treat of them at large. I shall only give a general account, for the purpose of exhibiting a complete view of the government of the state, which will be more easily acquired in this way, than by reading the statutes in an alphabetical arrangement. I shall handle the subject under the following divisions. 1. Of the powers of towns. 2. Of their meetings, and the regulations of them. 3. Who may vote in town meetings. 4. The officers of towns, with their power and duty.

1. Of the power of towns. They are communities or corporations—capable of suing and being sued, of prosecuting and defending

sending in any action. They have power to make such orders, rules, and constitutions, as concern the welfare of the town, provided that they be not of a criminal, but of a prudential nature, and that the penalties exceed not twenty shillings for one offence; and that they be not repugnant to the laws and orders of the state. All votes, acts, and orders of the town, shall be made by the major part of the qualified voters there present, and being so made, shall be deemed the act of the whole. They have the general power to do all acts that are necessary to promote their interest, and defend their rights.

They have the power of appointing such officers as will be hereafter enumerated. They must support their poor. They may lay taxes to defray their expences and pay their debts, and may appoint collectors. They must repair highways, and for that purpose, may divide the town into districts. They must maintain and keep up necessary bridges.

If any person lose his life, by the defect or insufficiency of any bridge or highway, after warning given to any of the selectmen in writing under the hands of two witnesses, or a presentment to the county court, the town shall pay a fine of one hundred pounds, to the parents, husband, wife, child, or next of kin, to the person deceased. If a person lose a limb, break a bone, or receive a wound, by means of such defect, the town shall pay to him double damage; so for an injury to any team, cart or carriage, horse or other beast, or loading, double damages are recoverable.

Upon complaint made of any town, to an assistant or justice of the peace, they are empowered to issue a warrant to the constable, to impress such workmen in their town as may be necessary to secure and repair any defective bridge or passage, which shall be paid by the town who ought to maintain the same. If a town neglect, or refuse to build, or repair a bridge across a river in the highway, or if towns neglect, where the river is the dividing line, it being their joint duty, on complaint by any person to the county court, they may enquire by a committee or otherwise into the necessity of the bridge, causing notice to be given to the selectmen, to shew reason why they should not be compelled

led to make or repair such bridge, and if no reason be shewn to the contrary, and such towns still neglect, said court may appoint some proper person to do it, and award execution for the expense against the town.

" It has been adjudged by the superior court, that an action will lie at common law, against any town, for damage done by the defect of a bridge.

" In an action on the statute respecting bridges, against a town, in which the plaintiff declared that he lost a horse &c. in attempting to pass a bridge, by the deficiency thereof, which the defendants were bound to keep in repair, and had notice that the same was out of repair, it was decided, that it was not necessary that notice should be given in writing to the town, to recover double damages, and that such notice was necessary only where a life was lost, and the action was to recover the forfeiture of one hundred pounds.

2. Of town meetings, and the regulations of them.—These are held by warning, or notification from the selectmen, on such occasions and at such times as their interest requires,—but four days notice must be given. They are bound to hold meetings annually in the month of December, to elect their officers: when the inhabitants are convened, they proceed to the choice of a moderator, to preside in the meeting. No person has a right to speak without his liberty, unless it be to ask liberty to speak. The moderator has the power to keep good order and command silence. All disturbances in such meetings, by preventing the choice of a moderator, abusing him when chosen, or refusing to keep silence when commanded, are punishable by a fine of five shillings, and if the offence be aggravated by some notorious breach of the peace, the offender may be bound to the next county court, who may impose a fine not exceeding ten pounds. And no meeting can be adjourned, but by the major part of the members present.

3. The persons who may vote in town meetings, are all freeholders, and lawful inhabitants, that have a freehold estate rated in the common list at fifty shillings, or personal estate at forty pounds

" *Eldrige vs. Town of Pomfret*, S. C. S. C. 1792.

" *Swift vs. Town of Keat*.

pounds, besides his poll, and that are twenty-one years of age. All other persons that presume to act, vote, deal, or intermeddle, are liable to a fine of fifteen shillings for every offence.

4. Of town officers with their power and duty, and 1. The selectmen, consisting of a number of the inhabitants, not exceeding seven, who take care of, and order the prudential affairs of the town. They are by office, overseers of the poor, and each town being obliged to take care of and maintain their own poor, this becomes a principal part of the duty of the selectmen.

The selectmen are bound to provide necessaries for all the inhabitants of the town, who are incapable of supporting themselves. Towns are obliged to support their respective inhabitants, whether living in the town to which they belong, or any other town, either with or without a certificate, who may need relief. If any person belonging to any other town, shall by sickness or otherwise be reduced to necessitous circumstances, it is the duty of the selectmen of the town where he is taken sick, to provide for his support, and they may lay an account of the expense before the county court, in the county where the town is, to which such person belongs, who having adjusted the same, may order the town to pay it, and grant execution accordingly, or the town may bring an action at common law, for the recovery of such expense, provided that such persons have not any estate, and no parents or masters, or any relations that are bound to support them. And if they have, then the expense is recoverable of those persons who are bound to provide support.

But if any person that has not gained a legal settlement in the town, shall by sickness or otherwise, be reduced to necessitous circumstances, then if any inhabitant of the town or other person in the town where such person is in want, have entertained him for the space of fourteen days without giving sufficient notice thereof, to the selectmen of the town, then such inhabitant, or such other person, shall support and sustain the whole expense—but if notice be given by such person within fourteen days to the selectmen, he is excused. The severe provision of this law, renders it necessary for people to be cautious about entertaining poor strangers: for if a poor person belonging to neighbouring town, that has relations to support

support him, or the town is bound to support him, or if he belong to any of the United States, excepting this state, or if he be a foreigner, shall be entertained more than fourteen days, without notice given to the selectmen, the entertainer must defray the expense, and can have no remedy to recover it from the relations, or the town that ought to support the person, or from the town where he is sick.

If any person not an inhabitant of any town in this state, shall be permitted to reside in any town, for the term of three months, without being warned to depart therefrom, notice being given to the selectmen, by any individual within fourteen days, if any have entertained him so long, then if such person be reduced to necessitous circumstances, by sickness or otherwise, such town must defray the expense.

But if the town have warned such sick and indigent person, within three months to depart the town, then the expense shall be defrayed out of the treasury of the state, by order of the governor and council : but no expense is paid by the state, excepting what arises within the three months after such stranger comes into the town, and within which he has been warned, unless it be expense incurred by sickness, or lameness, that commenced within the three months and continued after that time : and then the expense thus incurred, until the time that the person shall so far recover of his sickness, or lameness, as to render it safe to remove him, shall be defrayed by the state. But in all cases, as well of foreigners, as persons belonging to any of the United States, if they are permitted to reside in any town, after they have so far recovered as to be removed with safety, and are again taken sick, or who shall be permitted to reside in any town after three months, and then shall be taken sick—the town where they are suffered to reside, must defray the expense, and cannot call upon the state. This renders it necessary for towns to be careful about suffering persons not belonging to any town in this state, to remain there longer than three months, or after they have recovered from sickness, that commenced within three months, as they take upon themselves the burden of their support, in case they are reduced to want. But this provision of
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the law is well calculated to save expence to the state ; for towns will be much more cautious about suffering foreigners to reside in them, when they can recover no maintenance from the state, only for sickness, commencing in three months after their coming ; and the treasury will not be drained by those enormous bills, which towns are frequently too willing to enhance, because they are paid by the state. These regulations for the support of the poor extend to every case that can arise, unless perhaps there may be exception, where it so happens that the person who entertaining a poor stranger fourteen days without notice, is unable to support him ; then the law has made no provision for his support ; in every other respect the law has made provision for the support of the poor, so that every one may know where to call for his bread in the hour of want. This liberal and general provision of the law, has in a great measure superseded the necessity of the exercise of the God-like virtue of charity, but the benevolent may find many instances of private distress, which the law does not relieve to call for the acts of generosity. It may however be remarked, that the straggling beggar is generally to be suspected, for he who does not accept of the provision made by law, but prefers roving round the country to collect what he can, by exciting the compassion of the people, acts upon the principle of a knave, and such is so generally the character of those wandering mendicants, that the most liberal mind, will bestow upon them with a cautious hand.

It is the duty of the selectmen to warn persons not legal inhabitants of the town to depart the town, to procure them to be transported to the places where they belong, and to prosecute them when they neglect to depart the town on being warned.

Where there are any persons who have been, or are maintained by the town who suffer their children to live idly, and mispend their time, or neglect to bring them up, or employ them in some honest calling, or if there be any family who cannot, and do not make sufficient provision for support of their children, or if there be any children who live idly, and are exposed to want, having none to take care of them, then the selectmen with the assent of the next assistant or justice of the peace, are empowered to bind them out to

be servants or apprentices, males till they are twenty-one, and females till they are eighteen.

* A boy having no father, guardian, or master, lived with his mother who had married a second husband where he was well provided for, and educated—Three of the selectmen of the town, there being five, bound him an apprentice, one of which, being a justice of the peace approved of the indenture which was afterwards approved by another justice of the peace. It was determined that the boy under such circumstances was not liable to be bound out by the selectmen, that the selectman who was a justice could not act, at the same time in both capacities, which rendered the indenture void at the time it was pretended to be executed, and that a subsequent assent by another justice of the peace, could not make good what was originally void. The fairest and most reasonable construction of the statute is that the selectmen shall not bind out as apprentices, children unless they, or their parents are actually supported by the town.

The selectmen are to inspect the conduct of families in the education of children, and see that they instruct, or cause their children to be instructed to read the English language, to know the laws against capital offences, and to learn the rudiments of religion. If parents, or masters after admonition, shall neglect their duty and the children grow rude, stubborn and unruly, then the selectmen by the advice of the next assistant, or justice of the peace, are empowered to take such children, or apprentices, and bind them out so that they may be instructed, and governed, males till they are twenty-one and females till they are eighteen. The selectmen together with the civil authority are visitors of the schools. They have power to suppress riots, and read the riot act.

It is the duty of the selectmen to inspect the affairs and management of all persons in their towns; and if they find any who are reduced, or who are likely to be reduced to want, by idleness, mismanagement, or bad husbandry, they may appoint an overseer, to advise, direct, and order him for such time as they shall think proper. A certificate of which they must set upon the public sign-

post

* Strong vs. Brockway, S. C. 1794.

post, and lodge a copy in the office of the town clerk ; by which such person is rendered incapable of making any contract, without the consent of such overseer. If this method fail to reform such person, or without appointing an overseer, if judged proper, the selectmen may make application to the next assistant or justice of the peace, who may issue a warrant to apprehend him for examination, and to be dealt with according to law. If the person abscond, or cannot be taken, then the officer shall serve the warrant by leaving a copy at the last place of his abode. After this proceeding the selectmen, if no sufficient reason be offered to the contrary, with the advice of said assistant, or justice of the peace, are empowered to take such person, and his family under their care, and assign, bind, and dispose of them in service, as they shall think best. They are authorized, by the advice of said assistant, or justice, to take into their hands all the estate, both real and personal of such person, and the same dispose of, and improve for the benefit of such person or his heirs ; but may not sell lands without liberty of the general assembly. A certificate of their proceedings shall be set on the sign-post, and lodged with the town clerk, and within ten days an inventory of all the personal estate appraised by indifferent men under oath, shall be made, and lodged with the town-clerk. If any person withhold the estate, or credits of such person, the selectmen are impowered to recover the same by suit, or otherwise, and inventory the same ; and they are to pay all just debts. Such person is disabled from making any contract, that shall be valid in law. He may apply to the county court, if aggrieved with the doings, who upon hearing the case, have power to afford such relief as they think proper.

This mode of proceeding is peculiar to this state, and some part of it hardly compatible with the ideas of freedom. For the selectmen to take a man, with his family, and all his estate into their custody, and assign the man, and his family in service, and improve his estate as they please, is the exercise of a power, that the good of society cannot require, and which is repugnant to our ideas of civil liberty. There have been few instances where this power has been exerted, and where it is, the consequence generally, is the

very ruin of the family, and destruction of property, which the measure is intended to prevent. Perhaps the appointment of an overseer to prevent a person from making imprudent bargains, may sometimes answer a salutary purpose : and probably all the purpose that ever can be effected by all the restraint upon the natural liberty of man, which the whole of this process contains.

y We find a similar regulation was adopted by the Roman law, for where they found a man prodigal to that degree, that there was danger that he would squander away his estate, the magistrate interdicted him the administration or management of his estate, and committed the care of it to a curator, and then such person had no power to make contracts.

The selectmen, together with the civil authority, constables, and grand-jurors, annually meet some time in January, and nominate proper persons to keep houses of public entertainment in their towns the ensuing year, and also to nominate jurors. If any person who is nominated to be a tavern-keeper, shall neglect to take out licence, or be denied licence by the county court, or shall remove, or be legally suspended, or if an addition to the number shall be judged convenient and necessary, they may on proper notice, convene at any other time within the year, and nominate proper persons. They shall certify such nomination to the next county court.

The selectmen, together with the civil authority, are to inspect the conduct of tavernkeepers, and if from their own observation or the information of others, they find that they do not observe the law, they may cite them before them, and examine into the matter by proper evidence. If they find the tavernkeeper in fault, they may admonish him, or if they think proper, they may suspend his licence, till the next county court, and shall cause a copy of such order of suspension to be left with the taverner, and his house shall be under the same restraint as unlicensed houses. A certificate of these proceedings shall be sent to the next county court in the county. The selectmen, with the civil authority, and grandjurors, may post tavern haunTERS, by setting up their names at every tavern in the town, and prohibiting every tavern-keeper from entertaining or suffering them to have any strong liquor.

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The selectmen may lay out public highways, or private ways, as they shall judge needful, in the town, giving reasonable notice to the owners of the land thro which they are laid, or leaving notice in writing at the place of their abode, if within this state. The damage shall be paid by the town, if the highway be for public use, but if for private use, by the persons applying. A survey in writing, signed by the selectmen, and containing a description of the road, must be accepted by the town, and recorded in the records of lands, and satisfaction made to the persons damaged, or the money be deposited in the town treasury for their use, ready for them when they apply, according to an estimate made by three judicious disinterested freeholders under oath, appointed by justices of the peace, or as the selectmen, and parties interested agree; then the highway becomes established. The party aggrieved in any respect, may apply in eight months to the county court, who may appoint a committee or jury to enquire, and grant relief, either by discontinuing such highway, or private way, or increasing damages. If any person thro whose land such way passes, shall declare himself aggrieved, the same shall not be opened till the expiration of twelve months, to give him time to apply to the county court.

The selectmen with the civil authority, have power to make proper regulations respecting mad dogs.

When a woman that has a bastard child neglects to bring forward a suit for maintenance, or commences a suit, and fails to prosecute to final judgment, the selectmen of any town interested in the support of any such bastard child, where sufficient security is not offered to save the town from expense, may bring forward a suit in behalf of the town against him who is accused of begetting such child, or may take up and prosecute a suit begun by the mother of the child. They must appoint two or more persons to renew the bounds between their towns, and the adjoining towns, at least once a year in the months of March, April, October or November. The selectmen of the most ancient town must give notice to the selectmen of the other towns of the time and place of their meeting for perambulation six days before hand on penalty of four pounds.

The select men have certain powers vested in them to prevent the

the spreading of contagious sickness, as prescribed by statute. They may give certificates of the qualifications of persons to be freemen, under a penalty of three pounds six shillings, for a false certificate. It is their duty to erect, and keep up mile-stones, on the road, marked with the distance from the county town on penalty of forty shillings, and to erect stocks, and sign posts: it is their duty to see that all town officers who are chosen, of whom an oath is required, are summoned and sworn according to law. They may assess the town to raise money to defray expenses, in doing what is required by law if the town neglect to do it. They are to procure at the expense of the town, and keep standard weights, and measures, tried and sealed by the county standards, on penalty of forty shillings. They are to settle and adjust accounts against the town, and may draw on the treasurer for payment.

2. The town clerk, or register must be sworn, and his duty is to enter and record all town votes, orders, grants and divisions of land; to record all marriages, births, and deaths of persons in their towns, and to record all conveyances, and mortgages of houses, and lands lying in such town, which shall be presented to him. He is to note on the conveyance, or mortgage, the day, month and year of receiving them, and the record shall bear the same date. When there is no assistant or justice of the peace, residing in a town, he may administer the oath to town officers. They are annually in May to send to the treasurer of the state, the name of the persons who is chosen constable, to collect the state rate. They shall enroll the names of all persons who are admitted freemen.

* It has been adjudged that a town clerk being a public officer, having received a deed for record, may not suffer it to go out of his hands unrecorded, and if he does will be liable to any person who shall receive prejudice thereby.

3. The town treasurer must be sworn, and they have power to receive all monies, that shall become due to the town, by rates, fines, assessments, or otherwise and shall pay and deliver out the same according to the order of the town, or selectmen, keeping an

account

* Willard, vs. Hutchinson, S. C. 1794.

account of the receipts and deliveries, and accounting with the town, or selectmen, at least once a year. It is the duty of the treasurer to apply to the civil authority, for an account of all such fines, and forfeitures as shall be recovered by judgment before such authority, belonging to the treasury of the town, where such judgment is given, at least once a year and receive the same for the town.

4. Constables must be sworn. The town may elect a proper number to do the business. Their power is restricted to the town, for which they are appointed, in which they have the same as sheriffs in the county. They may raise, put forth, and pursue hue and cries to effect. They may without warrant, apprehend such as are guilty of drunkenness, prophane swearing, and sabbath breaking, also vagrant persons, and unseasonable nightwalkers, provided they are taken on sight of the constable, or present information of others. They may make search for all suspected persons, on the sabbath or other days, in taverns, or other suspected places or houses, and apprehend and keep in safe custody, till opportunity serves to bring them before the next assistant, or justice of the peace. It is their duty at all times, to search all suspected places for tiplers. The first constable chosen by the town, is also chosen collector of state taxes, which devolves upon him an additional duty. Upon receiving a warrant from the treasurer, he is to appoint the time and place for the inhabitants of the town to pay their rates, and shall give reasonable notice to them, and on their neglect to pay, then he has power to levy on their personal estate, if any can be found, if not, he may take real estate, or he may levy upon the body of such person, and commit him to goal. His warrant to collect the rates becomes an execution, and he must proceed with it accordingly.

• In an action against a town for the default of a constable in not duly serving a writ, he being a bankrupt, and in failing circumstances, at the time of his appointment, it was adjudged that towns are not responsible for the conduct of constables, whom they appoint, for they have no power to controul them or to require them to find surety, and are bound by law to appoint them.

5. Surveyors

• *Hullbut, vs. Litchfield, S. C. 1793.*

5. Surveyors of highways. The towns as often as they judge necessary, at their annual meetings may vote and agree, that the selectmen may lay out to each surveyor, his district, and what persons shall labour under such surveyor, and to alter such districts as occasion may require. When such divisions are made, it is usual for the towns to appoint a surveyor in each district, who must be sworn, and who have a right to call out all persons in the town from sixteen years of age to sixty, including indian, melatto, and negro servants, or slaves, excepting magistrates, justices of the peace, gospel-ministers, ruling elders, allowed physicians, constant school-masters, and millers, two days at least in a year, if their need be, and as many more as he shall judge necessary, which persons are to be directed by the surveyors. They may warn out teams. Three days warning must be given, before the day appointed for such employment. If any person neglect such service, after warning, it is the duty of the surveyor to make presentment to an assistant or justice of the peace, of such persons and their neglect, and if such persons do not in one week give sufficient reasons for their neglect, to such assistant or justice, he shall grant and levy a forfeiture of two shillings and three pence per day, for a man and double that sum, for a man and team, which shall be delivered to the surveyor, who shall lay out such monies on the highway, and if the surveyor neglects to warn out or to make presentment of neglects he shall incur a like forfeiture. The surveyors have power to clear water courses through lands adjoining to highways, for the purpose of draining off water from highways. Many towns have obtained the privilege of repairing their highways by taxes: in which cases they lay taxes in town meetings and the surveyors are also collectors, and either collect the money, and lay it out in repairing the highway, or oblige every person to labour to the amount of his taxes.

6. Listers consist of such number, as the town think proper to appoint, and are to be sworn. In July annually it is their duty to notify the inhabitants to bring in lists of the estate they own on the twentieth of August by the tenth of September, who on failure, are liable to be fourfolded. The listers are to transmit the sum total of the lists to the general assembly in October, on penalty of
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ten pounds to the state treasury : and all additions in May, when the grand list of the state is compleated, on which the public rates are laid. The listers are to lodge the lists of the town with the town clerk in January, on penalty of ten pounds to the town. And if no return be made to the general assembly, the town may be doomed at the discretion of the assembly.

If the listers overcharge any person, he may before the 20th of April following, make application to two justices, and three selectmen, who may grant him relief.

The list is made out by specific rates at which the polls, and estate, both real and personal, of the inhabitants are liable to be set, and by discretionary assessments of the listers on certain professions of business. An equal mode of taxation, is the great desideratum in government, as all ought equally to contribute to the support of that government that affords them protection. Many have been the efforts in this state, to accomplish this plan, and various are the schemes, that have been devised, but none has been yet adopted that gives universal satisfaction. It is probable on a full investigation of this subject, it will be found impossible to frame a mode that in its immediate operation, will compel every member of the community to contribute to the support of it according to the value of his estate, and it will be found to be a matter of certainty, that after a mode of taxation is adopted, the course of things will vary the value of estate, and the price of service, in the professions that are assessed, so as very nearly to proportion the taxes equally among the people. Upon this principle then it is adviseable to establish a mode of taxation as general as possible and on such articles about which there can be the least deception, and leave it to the operation of things to produce an equality. Frequent changes of the mode will only retard this operation.

But it is hoped that the state will so manage their finances as not to have occasion, to resort to direct taxation, as a system of revenue. It is wonderful to observe, with how much greater facility money can be drawn from the people, by indirect, than by direct taxation. The immense sums paid in Great-Britain, if collected by a direct tax, would very soon bankrupt the nation.—

The sum paid by the State of Connecticut to the United States, exceeds probably half a million of dollars annually. This would be a tax not far from two shillings on the pound. It would not be practicable to collect this sum by the direct mode, by which the revenue of the state is collected; but by the indirect mode adopted by congress, the money is collected, and the people feel from it no burden or oppression, and are not deprived of a single enjoyment. The tax works itself into the price of the articles consumed, and from time to time it is gradually and imperceptibly paid in small sums, without any inconvenience to the consumer.

7. Collectors of town taxes. Towns have a right to appoint collectors to collect such taxes as they grant, to defray the necessary expenses of the town. A proper rate bill must be made containing the sums due from each person, and an assistant, or justice of the peace, can grant a warrant to collect them. The collector has the same power in the collection of the rates, as the sheriff has in the collection of an execution. When they neglect their duty, and fail to make payment, the selectmen on application to an assistant or justice of the peace, may obtain a warrant against them, for the sum in arrear, which may be collected out of their own estates.

8. Grandjurors are officers appointed to make information of all crimes, that are committed, and for neglect of presenting any breach of law, of which they have knowledge, shall pay a fine to the town treasury. If any town neglect to make choice of grandjurors, they incur a penalty of five pounds to the county treasury.

9. Sealers of weights and measures, are to seal all the weights and measures that are used in the town, and no person shall use any weights and measures, that are not proved by the standard, under a penalty of five shillings, payable to the town treasury.

In addition to these officers, there are leather-sealers, tything-men, haywards, chimney viewers, gaugers, packers, and key-keepers, whose duty is of a nature, that it cannot be expected to be detailed in a general treatise.

All persons duly elected to any town office, that refuse to serve or take the oath (if any be required,) if able to execute the office, shall pay a fine of twenty-six shillings to the town treasurer. If any officer neglects the performance of the trust committed to him, he shall pay a fine of fifteen shillings. If by refusal, death, or removal, there be a vacancy of any town offices, the town may convene, and fill the vacancy.

CHAPTER SEVENTH.

OF SOCIETIES AND THEIR OFFICERS.

IN handling this subject, I propose to consider the ecclesiastical constitution of this state.

A remarkable difference is observable between ancient and modern times, respecting religion. *b* The pagan nations universally adopted polytheism, which admitting the idea of national gods, excluded the principles of intolerance, and the cruelties of persecution. *c* The Grecians and the Romans, vested the power of presiding in religious ceremonies, in the civil magistrate, and the same person inspected the entrails of the victims, and guided the councils of the nation. There was no distinction of clergy and laity. There were no priests to possess exclusive rights and temporal power, by which a particular order in the state, could be aggrandized, but the union of both powers in the magistrate, rendered religion subservient to the peace of government and the welfare of the people. The tolerant polytheist, beheld however, with indignation, the unsocial worship of the descendants of Abraham, who made it their glory, that they were the peculiar favourites and chosen race of a God, who was infinitely, superior to the gods of their neighbours. *d* But when the disciples of Jesus, emerged from the land of Judea, pronounced the gods of the conquerors of the world, to be false gods, and condemned their rights and ceremonies which had grown venerable by time, the tolerant hand of polytheism, was provoked to punish them, not for the errors of their religion, but for their obstinate contempt of the religion of the empire. Had they acknowledged the deities of their sovereign,

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b Gillies Hist. Greece, vol. i. chap. i. *c* Ferguson's Hist. Rome, vol. i. chap. i. *d* Gibbon's Hist. Rom. Empire. *e* Hume's Hist. Nat. Relig.

and claimed for their saviour, the common privilege of a national god, without doubt, Jesus would have been permitted to have taken a seat in the heavenly council on Olympus, in company with Jupiter and Juno, Mars and Venus. * But to dethrone the father of gods, and king of men, with the *f* thirty thousand subordinate deities, that presided over every department of nature, and on their ruins to elevate a crucified God, was deemed an act of impiety, that called for the highest indignation and justified the severest punishment.

When the superior beauty and excellence of christianity, dissolved the baseless fabric of pagan superstition, and brightened with new born lustre, the imperial purple of Constantine, it was thought necessary and proper, that the holy rights and ordinances, should be administered by hands set apart, and consecrated to that pious office. Hence arose a new order of men, and the ecclesiastical hierarchy was established.

Sundry causes co-operated to give the christian clergy, a power unknown to the pagan priesthood. The removal of the seat of empire from Rome, gave the bishop of that city, which having so long been the capital and mistress of the world, had acquired the respect and veneration of all nations, an opportunity to obtain an ascendancy and influence over the other churches, without the presence of a sovereign, to check the progress of their designs, or eclipse the pomp and splendor of ecclesiastical dignity. Had Rome been honored by the imperial residence, it is beyond a doubt, that the Roman pontiff had never acquired a greater share of temporal authority, than the patriarch of Constantinople.

g The northern nations who conquered and settled the provinces of the western empire, had been accustomed to yield the blindest submission, and most servile obedience to their priests. The druids, who performed the most solemn rites, and awful ceremonies in the deep recesses of the wide extended forests of Germany, were

e When Jove convened the senate of the skies,
Where high Olympus cloudy tops arise,
The Sire of Gods. — Hom. *Iliad*. viii. 3.

Panditur interea domus omnipotentis olympi,
Conciliumque vocat, divum pater, atque hominum rex,
Sideream in sedem. Virg. *Æneis* l. x. 1.

f Hesiod *oper. et Dier.* l. i. 250.

g *Cæsar de bellis Gallicis*. L. V. C. 13. *Tacitus de mor. German.* C. VII.
Mosheim's Eccl. Hist. Vol. II. 59.

were held by those heroic warriors, in higher estimation than their leaders, and governed them in peace and war with absolute sway. On their conversion to christianity, they conferred on the christian priesthood, the authority of the druids, and the bishop of Rome became the arch-druid of the christian world. To the simplicity of this religion, they annexed the magnificent rites of paganism, and a pure religion that was calculated for the poor, the meek, and the humble, whose precepts were to despise the world; to mortify the desires of the flesh, and the pride of the heart, underwent a transformation, by which the priesthood gained those perishing riches, and indulged in those sensual pleasures, which they affected to condemn, and the successors of a fisherman were invested with the highest dignity, and assumed the greatest pomp and splendor that ever were bestowed on worms of the dust. The popes, on the maxim, that all things were lawful for the saints, in pursuing the glory of God, took advantage of the weakness, the folly, and the ignorance of mankind, and practised pious frauds, and holy forgeries, to establish that supreme power, which they so ardently desired, and against which they pretended to have the authority of scripture, that *the gates of hell should never prevail*. The pretended gift of Constantine, of the city of Rome, and the actual donation of extensive territory by Pepin and Charlemagne, gave them a temporal power by which they greatly augmented their spiritual influence. They obtained an absolute authority over the opinions of mankind, and exercised over them, a more extensive and despotic rule, than ever was established by the arms of a conqueror.—Seated at the head of the church militant, and vested with the high privilege of infallibility in matters of religion, they fulminated their bulls, against all who opposed their supremacy. The potent sound of their voice, hurled emperors and kings from their thrones, and absolved their subjects from the oath of allegiance. They gave away the kingdoms of those princes who continued refractory, and trod on the necks of those who humbled themselves before them. The greatest potentates, deemed themselves honored to kiss the toe of the successor of saint Peter, and the vicegerent of God.

As ecclesiastical despotism, was founded on mere opinion, a uniformity

formity of religion became necessary to support it, and the popes exerted all their power to accomplish their favourite plan. As the clergy had such an irresistible controul over the minds of the people, it became necessary for kings, to admit such political establishments of religion, as they dictated, and to become the instruments of supporting and extending their influence, for the purpose of obtaining it to strengthen the arm of the civil magistrate. In this manner were introduced those two leading doctrines, in the politics of the dark ages,—the necessity of civil establishments of religion, and of uniformity of opinion in articles of faith, to maintain the authority of the church, and the power of government. The clergy usurped an uncontrouled authority in all matters, which they pretended, were of an ecclesiastical nature. They separated themselves from the civil state, they became a distinct order of men, devoted to the sole employment of religion, and forever ready to interrupt the tranquility, or impede the administration of government, when they thought it necessary to guard, or extend the rights of the church. Hence originated a government within a government, and a separation of interest between the clergy and laity, which produced perpetual discord and contention. The right of establishing uniformity in religious opinions, justified the majority, who assumed the stile of orthodox, in punishing the minority, whom they branded with the infamous name of heretics. This gave birth to the abominable practice of persecution, which these unfeeling tyrants reduced to system. The inquisition was instituted for the discovery and trial of heretics. *b* The wretched victims of spiritual jealousy, were stretched on the rack, to be tortured into a confession of crimes, of which they were innocent. When convicted by a mode of trial, which gave guilt and innocence equal chances to be acquitted, their excruciating agony, and intolerable distress, amid consuming flames, furnished a delightful spectacle to their cruel persecutors, who impiously pretended, that the God of mercy, and the father of mankind, would smell a sweet savour from such bloody and inhuman sacrifices.

When

b In 1680 Charles II. king of Spain, honoured by his royal presence, at auto de fe, the burning of an heretic, condemned by the inquisition.—So late as 1780, the holy inquisition, condemned to death, a woman for witchcraft and forcery, and she was burned pursuant to the sentence.

Bourgoanne's Travels in Spain, vol. i. 160. 173.

When the professors of the pure religion of the humble Jesus, had commenced a traffic in the sins and wickedness of mankind; and the corruption of the church of Rome, had become so enormous, as to call aloud for reformation, the bold hand of Luther, and the reformers, rent asunder the veil that had concealed the mysteries of papal iniquity for ages, and exposed to view the impurities and absurdities of the Romish religion. Yet the reformers never discovered the genuine principles of religious liberty. They did not deny the existence of a right, in the true disciples of Christ, to punish with temporal pains, and penalties those persons whom they deemed to be heretics. They censured the church of Rome, not because they persecuted, but because they persecuted the faithful servants of God. In every instance where they had power, they persecuted those whom they considered to be heretics. The barbarous persecution and cruel death of the learned and virtuous Servetus, which was procured by Calvin, in violation of every principle of justice and humanity, has stained with indelible infamy the character of that celebrated reformer.

When the English nation threw off the papal yoke, they vested in their sovereign, the power of supreme head of the church. They retained the doctrine of the necessity of religious uniformity, and ecclesiastical establishments, for the preservation of church and state. The act of uniformity that was passed in the commencement of the reign of the celebrated queen Elizabeth, established the rites and ceremonies of the church of England, and inflicted severe punishments on all dissenters. Thus the right of persecution was asserted, and the power enforced by an act of parliament, and during the reign of this queen and her successor, the unfortunate puritans experienced its dreadful consequences. They were punished for non-conformity to the established church, which they deemed idolatrous and heretical. They were prohibited from assembling for the purpose of conducting public worship, according to the dictates of their own consciences. Whole families were ruined by fines and imprisonments, and many learned, pious, and exemplary preachers suffered the punishment of death by the hand of the common executioner. The indefatigable zeal with which the clergy executed those barbarous laws, rendered the situation of the dissenters

senters wretched and deplorable, and led them to seek a country, where they could enjoy liberty of conscience, uninterrupted by the haughty domination of a priesthood, and the unrelenting fury of persecution. The wilds of America opened to them the prospect of an happy asylum, for the fruition of this inestimable blessing. Animated with this sentiment, some of the independents, a sect of dissenting christians, abandoned their native country, and embarked in an enterprise replete with danger, hazard, and uncertainty. Persecution in this manner originated and accelerated the settlement of North-America, the only good effect it ever produced.

Escaped from the severity and rigor of the ecclesiastical establishment in England, when they came to form their system for the government of church and state, the ministers and the people viewed each other with a jealous eye. They exercised the greatest caution, to avoid every thing that should expose them to suffer a repetition of those intolerable misfortunes, which had just banished them from their native land. The people were extremely careful not to trust in the hands of their ministers any temporal power, that could be exerted to the prejudice of their privileges, as citizens. The clergy having in their native country experienced the oppression of the civil arm, were equally cautious to guard against a power by which their immunities could be infringed. This mutual jealousy had the beneficial effect, to induce them to adopt a more mild and tolerant establishment, than that with which they had been acquainted. But even at this time, their misfortunes and their sufferings had not taught them the genuine principles of religious liberty. They still adopted the political error, that religion could not exist without uniformity of sentiment, and government without an ecclesiastical establishment. They therefore recognized the right of the true church to punish heretics, and enacted laws for that purpose. But the punishments grew mild in proportion to the progress of humane and benevolent sentiments. The happy era had not yet arrived, when these destructive principles should be exploded, and these barbarous institutions abolished.

* In the first settlement of Connecticut, the legislature adopted an ecclesiastical constitution of the following form. No persons could

embody

* Ancient Statutes of Connecticut revised in 1672 and published at Cambridge in 1673. 21.

embody themselves into a church, without the consent of the general court, and the approbation of neighbouring churches. No ministry, or church administration could be attended upon, by any of the inhabitants, distinct from, and in opposition to that which was dispensed by the approved minister of the place, without the approbation of the general court, and neighbouring churches, on penalty of five pounds. They expressed their apprehension of danger, from the divisions respecting church-government, yet from tenderness to the consciences of those, who differed in sentiment, they declared, that as the congregational churches in profession and practice, had been approved of, they would countenance the same, and protect them from disturbance till better light should appear; yet as there were sundry persons of prudence and piety of different sentiment, whom they wished to accommodate, they ordered that all such persons, being approved of according to law, as orthodox, and sound in the fundamentals of the christian religion, should have allowance in their persuasion, and profession, in church ways or assemblies, without disturbance. They enacted laws to punish persons guilty of reviling the preached word, interrupting or disturbing the preacher, or absenting themselves from public worship. For the purpose of maintaining the peace, and prosperity of the churches, as well as the rights and liberties of the people, they declared that the civil state had power and authority to see that the peace ordinances and rules of Christ, be observed in every church, according to his word, and to deal with any church member, in a way of civil justice, and not in an ecclesiastical way, and that no church censure should degrade, or depose any man from any civil dignity, office, or authority. They ordered the societies to make provision for the support of the ministers, and on failure, enabled the county courts to make provision. They were so fully convinced of the truth of their own creed, and of the right of punishing heresy, that they / enacted that all persons who should unnecessarily entertain any quaker, ranter or Adamite, or other notorious heretic, should forfeit five pounds, and the like penalty per week was inflicted on towns, that should suffer such entertainment; that no person should unnecessarily fall into discourse with them, on penalty of twenty shillings. The governor, deputy-governor, or assistants,

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/ Ancient statutes 28,

were impowered to commit them to prison, or send them out of the colony. The masters of vessels who imported them, were obliged to export them on penalty of twenty pounds. Such were the outlines of their ecclesiastical establishment. No rules of church discipline, or articles of faith were established: but the clergy were left to their own discretion. No test acts were passed, which excluded any denomination whatever, from holding offices in government.

In the year 1706, the law against heretics, as far as it respected quakers, was repealed. In 1708, a law was passed, declaring that all persons who soberly dissented from the worship and ministry by law established, might at the county court in the county where they belonged, qualify themselves according to an act of parliament, passed in the first year of the reign of William and Mary, and enjoy the same liberty of conscience as dissenters enjoyed in England. The act of William and Mary, exempted protestant dissenters from the penalties incurred by non-conformity, upon their taking the oath of allegiance, and supremacy, subscribing the declaration against popery, and repairing to some congregation registered in the bishop's court, or at the sessions. This act furnished a very imperfect toleration. It only exempted them from punishment for non-conformity, but left them obliged to pay tithes, which is a most intolerable burden on the whole community, without acquiring equal privileges, with the rest of their fellow-citizens. But even this partial privilege was obtained with great difficulty. At the revolution, the despotism of James II. the eloquence of Locke,^m and the liberality of William III. convinced the parliament of the propriety of relaxing from the rigor of the act of uniformity, and of excusing from punishment their christian brethren, who were guilty of no other crime, but a difference of sentiment in the immaterial points of religion. This produced the before-mentioned statute, which is called the act of toleration. It was very natural, that the assembly of Connecticut, should imitate the practice and adopt the improvements of the mother country, and this undoubtedly gave birth to the statute of toleration passed in 1708, in favor of the dissenters in this country. They were however, still subjected to pay to the maintenance of the standing ministry. This statute answered

^m Locke on toleration.

answered another excellent purpose, for it virtually tho not expressly repealed the law against heretics, which might then have been considered a great improvement in civil policy. Strange that mankind should generally derive greater benefit, from repealing laws, than enacting them : but in modern times, it is certainly a truth, that the happiness of the people has been more augmented by the repealing of laws that contravened the public good, than by any new regulations that have been devised.

In the year 1708, the general assembly expressed their approbation of the confession of faith, heads of agreement, and regulation of the administration of church discipline, agreed upon by the ecclesiastical synod held at Say-Brook, and ordained that all the churches thus united in doctrine, worship and discipline, should be owned and acknowledged to be established by law ; with a provision that nothing should be construed to prevent a society or a church soberly dissenting from the established churches, and allowed by law, from exercising worship, and discipline, in their own way, according to their consciences. This law, is the foundation of all the ecclesiastical constitution that has existed in this state. A sect of christians, conforming to the creed and church government, adopted by the synod of Say-Brook, was established. At this time, all the people whether they dissented or not, were bound by law to contribute towards the support of this ministry : but those, who conformed to the statute of toleration, were in every other respect independent of them.

But the government notwithstanding their tolerant principles, would not suffer any religious assemblies, unless conformable to the establishment or the statute of toleration. In the year 1723, they complain, that some persons without qualifying themselves according to law, for the enjoyment of liberty of conscience, presumed to form separate meetings, and that some administered the sacraments without ordination, they therefore passed a law, that all persons who neglected public worship in some lawful congregation, and presumed to meet in separate companies in private houses, should be punished with a fine of twenty shillings, and that every person not being a lawful or ordained minister, who administered the sacraments, should incur a penalty of twenty pounds. This law was

well calculated to excite tumult and promote dissention, but was necessary to preserve the establishment. When a government once makes an encroachment upon the natural rights of the people in one respect, they are obliged to do it in many others, for the purpose of securing the object in contemplation.

As soon as the principles of toleration were called into exercise other improvements were naturally suggested to the legislature. It soon was discovered to be contrary to the principles of religion, as well as justice, that a sect of christians who were tolerated and protected by law should contribute to the support of the ministry of another sect, whose difference of opinion prevented them from uniting together in public worship. In 1727, the professors of the church of England, made application to the assembly, stating that they were under obligations to support public worship according to the church of England, that dissenters had always esteemed it a hardship in England, to be compelled to contribute to the support of that church, praying that they might be exempted from such a hardship. This application was powerfully enforced by the consideration, that the applicants belonged to the church, which was established and protected by that government, to which Connecticut owed allegiance, and that there was danger, that force would be exerted to extort the privilege demanded, in case of refusal.— This accidental circumstance, produced this exemption, at a much earlier period, than it would have happened, if the same religious sect had governed in England and Connecticut. An act was passed, directing that the money collected of episcopalians, by taxes laid on the societies, should be paid to the episcopal ministers, in case there were any settled according to the canons of that church on whom such persons attended, and if the money so collected was insufficient, to support the minister, the episcopalians, might tax themselves for that purpose, and they were exempted from paying taxes to build meeting houses.

When fear and policy had introduced the exemption of the episcopal church, from contributing to the support of the established order, the precedent sanctioned the claims of every other denomination of dissenters. In 1729, the same privilege was granted to quakers, upon their attending the worship of God, in some society,
allowed

allowed by the statute of toleration, either in the government, or on the borders thereof, if so situated that they could attend therein; and producing a certificate that they had joined, and belonged to such society. In the same year the baptists on petition obtained the same privilege and exemption.

At this period the doctrine, that uniformity of religion was necessary to the existence of church or state was exploded, and one of the great sources of human calamity was dried up. At the same period was interwoven into the ecclesiastical constitution, the principle that the legislature had a right to interfere and discharge dissenters from any obligation to maintain the ministers of the standing church. The agreement of settling a minister, tho binding on the society, is merely a corporate or political transaction, and by no means involves a personal obligation upon the honor and consciences of men, like a private contract, because the majority governs, and a man may be legally subjected to a contract to which he never assented. The law was passed for the purpose of promoting the public good, and whenever an alteration became necessary for the same purpose, there must be an inherent right in the legislature, to make the alteration. It would be the highest absurdity to pretend that when the legislature had once adopted a regulation, they could not vary it according to the varying circumstances of the people. The settlement of ministers is merely a civil regulation, and in that point of view must be always under the power and controul of the legislature. This power has not only been possessed, but has in fact always been exercised by the legislature, and there is no contract of settlement, with any minister, but that was made at a time, when the parties concerned knew of the existence of such a power: In respect of the contracts now in being, the exemption of dissenters cannot be considered as an *ex post facto* law; for prior to the existence of any contract, by which any minister now claims his salary, the law had given them the privilege of discharging themselves in their individual capacity. Every minister must have known at the time of his settlement, that the individuals of the society, have a power to avoid the contract, as it respects them personally, so that while they have a challenge upon the society, as a political body, the members are excused from paying in their private capacity. In this manner

manner every member, by lodging a certificate, may excuse himself from the support of the minister, and withdraw from the society; by which the society undergoes a total transformation, and a new one rises out of the ruins of the old, discharged from the contract to pay the salary of the minister. The original society as it respects schools, continues in existence; but as relative to the support of public worship, it is dissolved, and of course the contract by the operation of a law in being when it was entered into by the minister and people, is annulled, and at an end. The late acts of the legislature, respecting dissenters, cannot be said to be *ex post facto* laws, authorising a breach of contract, and destroying the faith of government. They are only the exercise of that power which the legislature has always exercised in altering and explaining the mode by which dissenters may attain that privilege, which had long before been granted to them, and to which they have been forever entitled by the laws of nature, and the principles of justice. It may therefore be laid down as a position founded in truth, that the power of exempting by an act of the legislature, a person that becomes a dissenter, from a corporate contract, has ever been a part of the ecclesiastical constitution, and that the right of individuals to this exemption, is derived from that eternal bill of rights that originated from the fitness of things, and existed prior to, and is independent of all human regulations.

But the most glorious improvement in the ecclesiastical constitution was reserved for the æra of the American revolution. In the revision of the laws in 1784, the establishment of the church discipline and government agreed upon by the synod of Say-Brook was omitted, and liberty of conscience granted to christians of every denomination. Tho perhaps the legislature had it not in contemplation, yet here is a compleat renunciation of the doctrine, that an ecclesiastical establishment is necessary to the support of civil government. No sect is invested with privileges superior to another. No creed is established, and no test act excludes any person from holding any offices in government. The leading principle of the constitution is founded on the acknowledged truth, that the sublime morality of the christian religion, is calculated to make men good citizens, and that the beneficial effects of it will be most apparent, where

where it is least shackled with human laws. The regulations therefore grant to every person, the full liberty to adopt such creed as he pleases, and secure to every denomination, the power, and privilege of worshipping according to the dictates of their consciences. Thus we derive from the voluntary profession of religion, all the benefit of an ecclesiastical establishment, without the inconveniencies. Such is the history of the progress and gradual improvement of our ecclesiastical constitution. A concise view of the present state of it, will close this subject.

* The state is divided into certain districts, called societies, which have the power of assembling, of holding annual meetings, of appointing a clerk, treasurer and committee, of laying taxes, and appointing a collector to collect them. The major part of the inhabitants of a society have power to call and settle a minister, and make agreements with him respecting his salary, which shall be binding on the whole, and their successors. They are to lay taxes annually for the support of the gospel ministry, and can appoint collectors, and enforce the collection. If the allowance for the maintenance of a minister, be too scanty, on application, the general assembly may grant relief, and where the preaching of the gospel is neglected for a year or years, the general assembly may grant a tax, and when collected, the county court may dispose of it for the use of the ministry in the society. Such are the powers vested in the located societies. • To prevent them from tyrannizing over the consciences or the property of any of the people, the law has provided that every denomination of christians, who differ from the worship and ministry adopted by the major part of the inhabitants of the located societies, may form themselves into distinct churches or congregations for public worship, in such manner as they may judge proper, and that all persons who attend such churches or congregations may give under their hand, a certificate of their dissent, and lodge the same with the clerk of the located societies, and become wholly independent of them, and are to all intents and purposes, legal corporations—for the law provides, that all such churches and congregations which have or shall form themselves as aforesaid, and who shall maintain and attend public worship by themselves, shall have liberty and authority

* Statutes, 235. • Ibid. 416.

rity to exercise the same powers, for maintaining and supporting their respective ministers, and for building and repairing meeting houses for the public worship of God, as the other societies, and may in the same manner commence and hold their meeting, and transact their affairs.

This is levelling all distinctions and placing every denomination of christians equally under the protection of the law.† Indeed the people are left to their own freedom, in the choice of their creed, and mode of worship. The major part of the inhabitants of the located societies, possess the same privilege. Before the revision of the laws in 1784, while the church discipline adopted by the synod of Say-Brook, was in force, they were legally compellable to support the gospel, in that manner : and since that time, they have by common consent recognized the authority of that synod, and made their acts the basis of ecclesiastical government ; but as this has no legal force, they may adopt or refuse it as they please ; and may form any other rules of discipline, according to their own sentiments. In consequence of this a perpetual variation of religion may take place, without any interruption from civil regulations, and

† I have ventured to say that all denominations of christians are placed on a footing by law, because I consider they are so in effect, tho a little distinction is kept up, between the located and dissenting societies. The located societies have a right to tax all within their limits, who do not lodge certificates agreeable to law. The lodging of certificates by the dissenters, has been deemed by some a mark of degradation, but this idea may be removed when it is considered that it is not an act acknowledging any superiority in the located societies, it is nothing more than an act in the dissenter, to inform the located society, that he does not belong to them. It is only a legal mode of evidence to ascertain to what society the people belong. It is a part of the acts necessary to be done, to constitute a new society ; and when a number of persons, who dissent from the located society, have entered into a mutual agreement, established public worship, and lodged their certificates, they are during the continuance thereof, a complete, legal, corporation, and are precisely on the same basis with all other societies, without being amenable to them in any respect. As the located societies were first established, and are the most numerous, it was reasonable that dissenters who formed new societies, should lodge certificates with them.

Another difference is, that where a person attends on public worship in no religious society, he shall be taxed in the located societies. Such person ought to be taxed some where, and as dissenters, can have no claim upon persons, who do not join them, there is no injustice done them, by permitting persons who belong no where to be taxed where it will be most convenient : for it would be difficult for dissenters to adopt a mode to ascertain such persons, while the located societies, can do it with the utmost facility.

When I use the word dissenters, it is only for the sake of distinction, for I consider the inhabitants of the located societies, to be as much dissenters from other societies, as I do them from the located societies.

and christianity in every possible shape, is so far countenanced as to give the professors an undisturbed enjoyment of their own opinions. It is very possible, that the sect in the located societies, which have considered themselves established, may cease to be the major part, and become the minor, and be obliged to give certificates to them whom they now call dissenters. This opens the door for the progressive improvement of religion unshackled by human laws. Many of the absurd and irrational doctrines which have so long disfigured and disgraced christianity, are already exploded, and there is a prospect that many more will soon meet with the same fate. Mankind are rejecting those false appendages of religion, which have so long imposed upon them penances and restraints, that have only contributed to encrease their wretchedness and misery. They begin to entertain an idea, that religion was not instituted for the purpose of rendering them miserable, but happy, and that the innocent enjoyments of life, are not repugnant to the will of a benevolent God. They believe there is more merit in acting right, than in thinking right; and that the condition of men in a future state, will not be dependent on the speculative opinions, they may have adopted in the present.

It is a pleasing consideration, that pure religion and moral virtue, have augmented in proportion to the progress of liberality of sentiment, and that every relaxation of the severity of the ecclesiastical establishment, has contributed to the stability of government, and the happiness of the people. There are many who having in early youth, imbibed the false principle that government cannot exist without a civil establishment of religion, are now unwilling to rescind it: but a contemplation of this subject, must furnish the clearest demonstration. It will be found in all countries that ecclesiastical establishments have subjected mankind to a despotism that has largely contributed to their distress, and that human happiness has been proportioned to religious liberty. In this state, since the rejection of our ecclesiastical establishment, religion has become more flourishing, government more energetic, and the people more peaceable. These considerations must demonstrate the important truth, that a religious establishment is not necessary to the support of civil government, and that religion left to itself, will produce the happiest influence on civil society.

A question of importance has been frequently agitated with respect to the right of government, to interfere in the concerns of religion. I am clearly of opinion that no legislature has a right to prescribe the ceremonies, the creed or the discipline of a church : but that where the people in general acknowledge the truth of a particular religion, and the duty of public worship, the legislature may step in to their aid, and enact laws that are necessary to enable them to support public worship in a manner agreeable to their consciences. In this state, the people in general recognize the truth of the christian religion, and the duty of public worship. The legislature without establishing any religion, has considered christianity to be the religion of the people, and has enacted laws to authorise the people to maintain public worship, in the manner which they deem proper. No mode of worship is prescribed, no creed is established, no church discipline enforced. In point of principle there is no coercion. In point of support there is no compulsion, only in such manner as by their own acts, all have acknowledged to be right, and to which they have agreed to submit. A Jew, a Mehometan, or a Brannin, may practice all the rites and ceremonies of their religion, without interruption, or danger of incurring any punishment. A fair construction of the law will give to every person that religious liberty, which leaves no ground for complaint or dissatisfaction. Every christian may believe, worship, and support in such manner as he thinks right, and if he does not feel disposed to join public worship, he may stay at home and believe as he pleases, without any inconvenience, but the payment of his tax to support public worship in the located society where he lives.

The only ground of dispute between different denominations, is with regard to the construction of the statute, securing the rights of conscience. Heretofore, dissenters, as it was always in the power of the inhabitants of the located societies, to try the legality of their certificates of dissent, have been subjected to hard and rigorous usage. Courts and juries have usually been composed of what was considered the standing church, and they have frequently practised such quibbles and finessè with respect to the forms of certificates

cates, and the nature of dissenting congregations, as to defeat the benevolent intentions of the law. Such an illiberal prejudice is manifestly repugnant to the genuine spirit of christianity. Christians ought to attend to two considerations, which are of great importance as relative to the peace of society. In all instances where a dissenter claims to be exempted from paying taxes to the support of the ministry in the located societies, by virtue of the statute, and the question is brought to trial before a court of law, the triers should be extremely careful to strip themselves of all that prejudice which different sects are too apt to feel towards each other, they should judge upon the most enlarged principles of charity, and give the law the most candid and liberal construction. For nothing is more disgraceful, than for one sect to draw the support of its ministry from another. The very semblance of persecution should be avoided.

On the other hand, christians ought not to separate from each other on slight grounds. There can be no impropriety in their uniting together in the public worship and adoration of the common Father of all men, tho they should entertain a great diversity of religious sentiments. There can be no necessity, that all the members of the congregation should believe alike to render worship sincere. Each will believe and worship for himself, and their union in the act of devotion will be acceptable to God, tho there be as many different opinions as there are members of the congregation. For near eighteen centuries, the different sects of christians have been quarreling with each other, respecting a religion which recommends, brotherly love, as the most essential duty. It is time that they began to practice the religion they profess. They ought to know, that no one can have any occasion to quarrel about it, because every one has a right to think as he pleases. May we not hope, that the period is not far distant, when mankind will have sense enough to discern the extreme folly of a religious quarrel.

OF SCHOOLS.

CHAPTER EIGHTH.

OF SCHOOLS.

OUR law has established very plain, but effectual regulations for the keeping of schools. In every town, where there is but one ecclesiastical society, wherein are seventy families, or more, and in every ecclesiastical society (where there are more than one in a town,) containing seventy families or more, there shall be constantly kept and maintained, one good and sufficient school, for teaching and instructing youth to read and write, by a master well qualified for that purpose: and where the number of families is less than seventy, a school shall be kept half the year, and in every county town, there shall be constantly maintained a grammar school, kept by a suitable master, acquainted with the learned languages.

But such is the extent of towns and societies, that these regulations could have produced but little effect in the general diffusion of learning. In consequence of this, another regulation was adopted, which is calculated to furnish the means of education, to all the children in the state. Every town which contains only one society, and every society where there are more than one in a town, have the power in legal meeting, to divide themselves into proper and necessary districts, for keeping their schools, and to alter and regulate the same from time to time, as they shall have occasion: in virtue of this law, every town and society, have been divided into districts of such convenient and suitable extent, that all the children within the same, can daily attend on schools. The law also provides that every such town and society, at their annual meetings, may appoint committees, whose special duty shall be to see that schools are kept; and the practice has been every year, to appoint some person in every district, to be a committee, who is responsible that a school shall be kept in the district, and who has power to procure a master for that purpose. He usually assembles the members of the district, to take their voice and direction in the contract with the school-master, and any other provision that is necessary to be made, for the support of the school. In all these districts, schools are commonly kept, from three to six months in a year, but in all the principal towns, schools are constantly kept.

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As districts are considered to be the principal organ through which schools are established and kept, additional power has lately been conferred upon them by statute, by which they are better qualified to answer the design of their institution. The members of the several School districts qualified to vote in society meetings, have power and authority to levy a tax upon the polls and rateable estate of the inhabitants, to build and repair school houses in such districts; and to appoint collectors, who shall have the same power to collect such taxes, as society collectors, and to choose clerks in such district, who shall be sworn to make true entries, and give true copies of all their votes and proceedings. For this purpose the school committee within each district or such person as he shall appoint, shall duly warn the inhabitants in the district, who are liable by law to pay rates, and who are qualified as aforesaid to vote, to meet at some convenient place in the district, at least three days inclusive, before any tax should be laid. Two thirds of the members qualified as aforesaid, and present, must concur in a vote, laying a tax, and fixing the place where a school house shall be erected.

But it would have been vain, to have passed laws requiring schools to be kept, if means had not been provided to defray the expense. For this purpose, the legislature have adopted the cheapest and most effectual expedient. The treasurer of the state is directed, annually to deliver and pay the sum of forty shillings lawful money, for every thousand pounds in the lists of each town, and proportionably for lesser sums, out of the taxes annually collected from each town for the support of civil government, to the school committees in the respective towns and societies, and for want of such committees, to the selectmen of each town: which money so received, is to be distributed among all the societies, for the benefit of schools in proportion to their lists, and from them such money is to be distributed among all the school districts in proportion to their lists, upon this condition, that the society committee or selectmen must deliver certificates, that schools have been kept, the preceeding year, in the towns or societies, for whose use they apply for the money according to law. In this way, the money

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is collected with the public tax, but is payable only on condition, that the law is complied with.

The legislature also have disposed of the avails arising from the sale of lands in the state, and from excise, to certain towns and societies to be kept as a permanent fund, and the annual interest thereof to apply to the use of schools in such towns or societies, and to be divided among the districts in proportion to their list, and to be forfeited on misapplication, to the state treasury. In many places, private donations and grants have been made for the same purpose. In case the foregoing provision shall be insufficient, then one half the expense is to be paid by the inhabitants of the town or society, and the other half by the parents and masters of the children that go to school : unless such town or society otherwise agree, which they have power to do ; and the law gives them full power to grant and levy taxes for the support of schools and to appoint collectors, to collect the same : and whatever they shall agree upon for the support and encouragement of schools, shall be binding on the whole. In consequence of this law, the general practice is, in each town consisting of one society, and in each society, where there is more than one in a town, to lay an annual tax for the support of schools, to a certain amount on the polls and rateable estate, and appoint the school committee in each district the collectors, by which method, a sufficient sum may be at all times raised to support schools : and the persons who are to take the immediate benefit of it, have the power to grant the taxes.

The selectmen of the town where there is but one society, and the committee of each society, where there are more than one in a town, have the charge of all school funds, whether consisting of money, or lands, and have power to let out money at interest, and lease lands and do all necessary acts for the preservation and management of such funds : excepting where the grantors, or general assembly in certain cases have committed the care of such estate, to particular persons, with direction for a continual succession.

The civil authority and selectmen in each town, are appointed
visitors

visitors of schools, with power to visit and inspect the state of schools in their towns, from time to time, and particularly once each quarter of a year, and to enquire concerning the time they are kept, the qualifications of the master, and the proficiency of the scholars, and to give all necessary directions to render them most useful for the increase of knowledge, religion, and good manners. If they discover such disorders, or misapplication of public monies allowed for the support of schools, as will probably defeat the good end proposed, they are to lay the same before the assembly, that proper orders therein may be given.

Since writing the foregoing, the legislature in May 1795, passed an act, appropriating the interest arising on the principal sum that should be obtained by the sale of the lands belonging to this state, west of Pennsylvania, to the use and support of schools, with the privilege to every ecclesiastical society, with the concurrence of two thirds of the inhabitants, to petition to the legislature, for the application of their proportion, to the support of the gospel ministry; which the legislature have reserved to themselves the power to grant during pleasure. No country can boast of a more liberal and noble establishment for the support of schools of instruction, and millions yet unborn, will bless the extensive and patriotic views of the authors of this goodly work.

In the course of these enquiries, we have treated of towns, societies and schools. The peculiarity and importance of these institutions, require a more minute discussion.

Towns in their present form, are a corporation which originated in the state of Massachusetts, and are coeval with the settlement of the country. Tho it be unquestionably a fact, that our ancestors borrowed the name of towns from the country that gave them birth, yet so different are the powers and privileges that are vested in such corporations here from what they had in England, and so little is the resemblance between the institutions, that our towns ought to be considered as an original discovery in civil policy. At the first settlement of an uncultivated country, it was natural to lay it out in small towns, for the purpose of accommodating the adventurers who commenced the settlement in small parties. When
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towns were thus instituted, it was natural to vest them with all the powers necessary to manage their internal concerns, and for their mutual protection and defence. It is beyond a doubt that the peculiar situation of the first settlers of this country, led to the discovery and establishment of towns. The same principles induced the first settlers in this state, to adopt the same institution. They therefore divided the country into towns of suitable extent, to accommodate the meeting of the inhabitants for civil purposes. However unimportant this practice may appear to the careless observer, yet an attentive examination of it will convince every body, that it is the introduction of a principle, which, if carried to its full extent, may produce the most beneficial effects in a republican government.

Towns are probably the most genuine democratic corporations, that are to be found in any country. The people have a right to assemble personally; they have when assembled, the power to appoint certain officers, and to pass certain laws for their internal regulation. The power delegated to towns is restricted to such narrow limits, that they cannot encroach upon the government. They are only authorized, and enabled to do certain acts, respecting their own immediate and local concerns, which could not conveniently be done by the state legislature. Here then by the instrumentality of towns, the influence of government may be extended to the minutest interest of mankind, the most perfect order and regularity be established in every part of the community, and the whole strength of the people be called into action, with the greatest facility. These popular privileges have a powerful effect upon the personal character. Every inhabitant of a town, in virtue of his corporate rights, feels that he is of considerable consequence among his fellow citizens. He does not feel himself degraded to the low rank of a slave, who has nothing to do, but to obey; but from the share which he has in the government, he is conscious of the dignity of a freeman, and has a personal pride and interest, in the support of a government in which he is entitled to so much consideration and respect. The share which he has in the administration of the affairs of a town, teaches him the duty, and the necessity of obedience to law,

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and subordination in civil society. The observation of the necessity of order and regularity, to preserve the tranquility of a town, convinces him of their necessity in government. Such ideas grow familiar and habitual. He becomes accustomed to think, reflect, and judge upon such useful topics with candour and correctness. The course of his practice and the train of his sentiments, lead him to be a quiet citizen and a good man, and prepare and qualify him to act an able part, in the higher offices of government. The frequent meetings of the inhabitants of towns for such important purposes, give them opportunities of cultivating an acquaintance with each other, and have a powerful tendency to improve their sentiments, and civilize their manners. They contract a mutual friendship, and become united like a band of brothers. Their personal respect, and esteem, will prevent those quarrels and contentions, which too often mark the meeting of strangers, or people that collect from large districts.

But the singular advantages of this institution are displayed in the most conspicuous manner, in the election of public officers. The moderate size of the towns, renders the assembling of the freemen convenient, and the smallness of their number, permits a personal acquaintance with each other. This prevents them from being the dupes of party and faction. In the choice of the representatives of the state legislature, they are too well acquainted with the personal character of every freeman to be deceived, and imposed upon. In the choice of officers, who are elected by the whole state, the great number of towns, prevents the practicability of extending the arts of intrigue effectually through the state. An artful man, may influence a few towns, but it rarely happens that the whole state is operated upon by such influence. We never hear of quarrels, tumults, and riots, at elections: they are generally conducted with good order and propriety. But where people assemble from a large district, the remote parts must be strangers to each other, will be actuated by different interest, and will have their local friends to support. This naturally leads to disorder and violence, and the scene will be greatly heightened by the numerous concourse of electors. Hence in some countries, the several candidates, by every art of intrigue, and bribery attempt

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tempt to obtain votes. Having canvassed the district, to make known their wishes, having solicited the assistance and patronage of their friends, and having induced the electors to attend, by a liberal distribution of the juice of the grape, they place themselves at the head of their parties, and continue the practice of their intrigues. These parties armed with clubs frequently meet, dreadful affrays, and riots ensue, well fought battles take place, and the combatants part with broken heads and bloody noses. It is a serious consideration, that in any part of the union, such practices should be tolerated. The people who are unaccustomed to such violence, will hardly think that their liberties are safe, in the hands of a man who puts himself at the head of an armed mob, to gain an election. Some gentlemen who lament the practice, declare, that in many places, they cannot obtain an election, without soliciting and treating the freemen for their votes. A practice so dishonorable to human nature, and so dangerous to civil government, ought to be abolished. I know of no mode more effectual to accomplish it, than to direct the freemen to meet in small bodies, from small districts. In the state of Connecticut, the sentiments of the people would not permit such arts of intrigue to be practised, and the most popular demagogue would not be able to excite a riot.

The division of a state into a large number of towns, breaks the spirit of sedition, and weakens the principles of anarchy. The flame of discontent cannot circulate with so much rapidity, and the schemes of faction will be constantly interrupted in their progress. When the people assemble only in small bodies, and the boundaries of a town will limit the place from which they collect, they will generally be cool, and deliberate, and will not be impressible by the strong impulse of democratic violence, and rashness. If there be an attempt to draw the people generally into any scheme, there will be no mode, but to elect a number from each town, to meet for that purpose. The moment this mode is adopted, the prospect of much mischief vanishes. The persons thus elected are placed in a peculiar state of responsibility, and when they meet, their number will be so small, that they will be more disposed to proceed with deliberation, than to rush headlong into measures, with the violence of a mob.

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But when the people are allowed to assemble in large bodies danger is to be apprehended. Their violence, and inconsideration, seem to be proportioned to their numbers. They neither reflect, or deliberate. They are governed by the impulse of the moment. Fired by the slightest rumour they are too impetuous to search for the truth. They are ripe for the most hazardous, and rash measures. An artful, and designing man can direct their motions at pleasure. They yield the blindest submission to the will of their leader. The flame of sedition flies like the electric fluid instantaneously from man to man, their impetuosity encreases every moment, there is no enterprize too daring, no scheme too horrid for them to attempt. They neither hearken to council, nor yield to opposition, they bear down all before them with irresistible fury. The populace of a large city, when convened in a mob, are the most dreadful monster, that ever was let loose upon civil society. Ignorant, profligate, and headstrong, they regard no consequences, they rush where passion prompts, and death and desolation mark their progress. Experience evinces the truth of these remarks, and demonstrates the impropriety of a civil institution, that requires the people to assemble in large bodies. It demonstrates also, the inconvenience of large cities, which will too often be the nurseries of vice, dissipation, and sedition. It is a happy circumstance, that the locality of Connecticut will not admit the growth of any very large town ; but that the channels of commerce, are distributed to so many towns, as to prevent the accumulation of great wealth and population, at any one place. A very large city is attended with many inconveniences to society. It concentrates too much power in one place. It destroys the proper equilibrium, and endangers the existence of the government, and the tranquility of the community. Where a town is likely to grow too large, a rival town ought to be encouraged in such a manner as to direct the channels of business through every part of the country, and establish a number of towns of equal magnitude, that may counterbalance and counteract each other. These observations are fully justified by the conduct of all large cities.

Ecclesiastical societies are a corporation co-eval with our government, and calculated for the purposes of religious worship,
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and moral instruction. The right of the people to assemble and deliberate in their meetings, furnishes an opportunity for improvement similar to towns : but the great advantage derived from these corporations is, that they lay a foundation for the general diffusion of useful information. In every society, a teacher is employed to instruct the people in the duties of religion and morality, on a day set apart for that purpose. These discourses are not only calculated to prepare a man for a future world, but in doing this they instruct him in the duties he owes to mankind. They teach him to restrain his vicious propensities, by the most powerful considerations. They impress upon his mind the principles, and form the habits of virtue. They lead him to think and reflect, upon the most important duties of life. They accustom the mind to useful researches, and serious contemplation, and point out the necessity of regularity in society, and subordination in government.

The frequent meeting of friends, and neighbours, for religious worship, cultivates and enlivens all the social feelings ; it softens, harmonizes, and improves the human heart ; it extends the principles of benevolence, and brotherly love. It smoothes the asperities of temper, and polishes the roughness of disposition. It refines the manners, and liberalizes the sentiments. Man by such intercourse, ceases to be austere, ferocious, and savage, and the propensity to contend and quarrel is lost in the feelings of humanity. The solemnity and regularity of religious worship, give to their manners a certain elevation, decency, and dignity, and learn them to treat each other with respect, attention and propriety. The relish for society, is heightened and the manners improved, without corrupting their morals, or debasing their sentiments. To make a respectable appearance in such an assembly, it is necessary that they pay a proper regard to dress, and this inspires them with a taste for neatness, elegance, and cleanliness. In fine, religious assemblies may be made a noble source of useful improvement, and rational entertainment.

Schools are an establishment, that is calculated to lay the foundation for that early instruction, which is necessary to make men good citizens. Education is a copious and interesting theme,
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and has long occupied the attention of legislatures and philosophers. The Persians the Cretans, and the Spartans, attempted to establish a national education. Their views were not directed to the communication of science. Their object was the practice of bodily exercises, and the impression of certain sentiments correspondent to the nature of their institutions. The Spartan system which has been the most celebrated, was intended to inspire with sentiments of heroism, and patriotism, the freemen who were supported by the industry and labour of slaves, and did not regard the happiness of every part of the community.

Quintilian, Milton, Locke, and Rousseau, employed their sublime talents, in sketching plans for the education of youth: but these were calculated for those who had wealth and leisure, to devote their whole time to the pursuit. They did not contemplate the idea of general education. This honour has been reserved for the state of Connecticut, and some of the other states in New-England. In no other country, have the legislature established, and provided for a system of education, that is calculated to diffuse to all classes of the people, that general information which they are capable of acquiring, without interfering with that portion of labour which is necessary to obtain a subsistence.

No man can acquire very extensive knowledge by his personal experience and observation. Science has been the result of the experience and observation of many different persons, in different ages and countries. By committing their ideas to writing, they have been able to collect, arrange, and mature them, and transmit them to successive ages. Our ideas must be confined to a very narrow circle, unless we can unlock the treasures of learning, and be benefited by written communication of information, from every part of the world. These considerations clearly point to that kind of science which is most useful and necessary. On this subject, our ancestors at a very early period of the government, formed a just opinion.

Before the year 1672, they passed an act, which as it is expressive of their peculiar sentiments and stile, is worth transcribing.

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“ It being one chief project of satan, to keep men from the
 “ knowledge of the scriptures, as in former times, keeping them
 “ in an unknown tongue, so in these latter times, by persuading
 “ them from the use of tongues, so that, at least the true sense
 “ and meaning of the original, might be clouded by the false glof-
 “ ses of saint-seeming deceivers ; and that learning might not
 “ be buried in the graves of our fore-fathers, in church and colo-
 “ ny, the Lord assisting our endeavours. It is therefore ordered
 “ by this court, and the authority thereof, that every township
 “ within this jurisdiction, after the Lord hath encreased them to
 “ the number of fifty householders, shall then, forthwith appoint,
 “ one within the town, to teach all such children, as shall resort
 “ to him, to write and read : whose wages shall be paid either
 “ by the parents, or masters of such children, or by the inhabi-
 “ tants in general, by way of supply, as the major part of those
 “ who order the prudentials of the town, shall appoint : provided
 “ that those who send their children, be not oppressed by paying
 “ much more, than they can have them taught for in other towns :
 “ and it is further ordered, that in every county town, there shall be
 “ set up and kept a grammar school, for the use of the county, the
 “ master thereof being able to instruct youths, so far as they may
 “ be fitted for college.”

They soon after passed a law, that in every town where there
 were seventy householders or more, they should constantly have a
 school master able to teach children, to read and write : if less,
 then for half the year. And that there should be a grammar
 school in every county town. For the maintenance of school mast-
 ers, they provided, that every town should annually pay forty
 shillings, for every thousand pounds in their lists, and if that sum
 should not be sufficient, the residue to be provided, one half by
 the town, and one half by the parents and masters of the children.

In the year 1717, an act passed, requiring that in every society,
 where there should be seventy families, a school should be kept
 eleven months in the year, and if less, then half the year : and
 the society should have power to levy and collect taxes for the sup-
 port of schools.

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Such was the manner, in which our ancestors were led to establish, and provide for the support of schools. The delegation of power to societies, to levy taxes for that purpose, was a wise measure : but the provision for the payment of forty shillings, for every thousand pounds in the general list, to be collected with the public taxes, deserves the highest commendation. Tho this system of instruction may at first view appear to be of trifling consequence, yet an attention to its beneficial effects, will evidence it to be one of the wisest and noblest institutions that has ever been discovered and adopted, in any age or country. Did I know the name of the legislator, who first conceived, and suggested the idea, I should pay to his memory, the highest tribute of reverence and regard. I should feel for him, a much higher veneration and respect, than I do for Lycurgus, and Solon, the celebrated legislators of Sparta, and Athens. I should revere him as the greatest benefactor of the human race, because he has been the author of a provision, which, if it should be adopted in every country, would produce a happier and more important influence on the human character, than any other institution, which the wisdom of man has devised.

Tho the provision be small, yet it is placed upon a basis calculated to produce great consequences. The law requiring the keeping of schools in every society, might have been of difficult execution, had not a sum been provided for their support, payable only on the condition, that they are kept. This will be a sufficient inducement to parents to raise in some other way, a sufficient sum to support a school for such length of time, as will be advantageous to their children, in order to obtain the proportion, of the money, which will be collected from them, in their public tax, and which they must lose, unless they procure schools to be kept. The law having exhibited a motive sufficient to introduce schools, their beneficial effects when experienced, will infallibly induce their continuation.

The importance of this institution, is manifested by the consideration, that it communicates to all classes, that degree of knowledge which they are capable of attaining. That mankind at large, should

should become scholars and philosophers, is manifestly impracticable. It is however, evident, that they are capable of acquiring a portion of science sufficient to convey them accurate ideas, respecting the duties of religion and virtue, to understand their own rights, and privileges, and to comprehend such topics for contemplation and conversation, as will give them a relish for the social pleasures. In the common schools, children at the time of life when they can be spared from labour, may have an opportunity to be instructed in reading, and writing, and those branches of the mathematics, which will qualify them for the ordinary business of life. If gentlemen wish to give their children liberal educations and make them men of science, or prepare them for the learned professions, they may send them to the colleges. This is a branch of education, with which no government could intermeddle with propriety; but for the purpose of guarding against the inconveniences of ignorance, a government is bound to make provision for the general education of children.

How noble, how elevated does this system appear, when it is considered, as calculated to extend the blessings of knowledge, to all ranks of people, to teach them to assert their rights, to regard the laws, and to be happy in the social intercourse. When we read the systems of education, which are designed for the children of opulent persons only, how contemptible do they appear, when compared with a system that spreads information through the whole mass of the people, and communicates happiness, as far as it extends. How does the mind expand, how does the heart dilate, at the glorious prospect of such wide extended happiness and information. The more I contemplate the scene, the more I am delighted. I feel a pride to think that my country has been enriched by such a noble discovery. I feel an enthusiasm to communicate it to the world, for the purpose of extending happiness to the whole human race.

We are next to consider the actual influence of these institutions upon science, manners, society, and government.

Schools have communicated the rudiments of useful literature, to all the classes of the people. It is a rare instance, that there
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is a person of sufficient age in the state, who cannot read and write and who has not sufficient knowledge in arithmetic to keep ordinary accounts. It would be deemed a great disgrace to a parent not to give his children opportunity to acquire knowledge, competent for the common purposes of life. The knowledge thus acquired in schools, at an early period in life, excites an ardent curiosity, and a strong desire to pursue it in maturer years. The consequence is, that so great is the relish for literature, that many private families, have libraries for themselves, and there are many instances of the associations of neighbourhoods, who at their joint expense, purchase useful and valuable collections of books for common use. Reading has become a very common amusement, and literature a frequent subject of conversation. This has rendered the people extremely inquisitive, respecting the events that are passing in the world. To gratify this curiosity, a great number of weekly papers are published, and there are but few persons who are not at the expense of a news-paper, for their amusement and information.

When knowledge has communicated to people proper ideas respecting moral virtue, and the dignity of human nature, they will despise licentiousness and debauchery. Innocence and purity of manners, will be an object of the highest consideration, and the virtues which embellish the human character, will be in repute and in practice. While we do not pretend that our manners are perfectly pure and uncorrupted, it may be said, that they are distinguished by decorum and delicacy. We cannot expect that refined politeness, that polished elegance, which have distinguished some nations, among a people, who live in the constant practice of industry : yet for the purpose of solid happiness, our manners will yield to those of no other country. We are a fair medium between the refined dissipation and extravagant luxury of courts, and the meanness and licentiousness of a poor and uninformed people. Our citizens are open in their manners, frank in their sentiments, and sincere in their professions. They have a capacity to enjoy, and a disposition to relish the charms of conversation, and the pleasures of society. They are generally eminent for the virtues of sociability, hospitality, and friendship. They form extensive connexions with each

other, and their frequent intercourse, furnishes a rational and delightful amusement. The intercourse between the sexes, is characterized by decorum of behaviour, and delicacy of sentiment, and private families are generally distinguished by an uninterrupted enjoyment of domestic felicity.

But when we contemplate the influence of these institutions with respect to the government, they appear most conspicuous and important. We see every where good order prevail. The people universally acknowledge and express proper sentiments respecting subordination to government, and submission to the law. There are no riots, tumults, or sedition. The equal distribution of property among the people, originated from the circumstances attending the first settlement of the country, and has been preserved by the influence of our subordinate institutions. The people are too nearly upon a level, to permit many persons to accumulate great wealth: and whenever it has happened, the distribution of it by law, among his children, at his decease, has generally restored things to their proper level. This equality of condition, has had a wonderful effect in preserving the peace, and good order of the community. No man can acquire sufficient personal influence, to disturb the public tranquility. The people in general are too well informed and have too much individual consequence, to be the dupes or instruments of designing men. There are few, who are very rich, or very poor. In easy circumstances, with a moderate share of property, they are generally industrious and economical. There are few who live without labour, or an attention to business, and but few who cannot live by their labour. This banishes that spirit of indolence and dissipation, which prevails among people who have too much wealth and leisure: it restrains from the pursuit of vicious amusements, and forms a habit of perseverance and prudence. The state is divided into small farms, and the proprietor usually cultivates his plantation with his own hands. The farmers generally live in that ease and independence, which kings might envy, and are the happiest class of people on the globe.—When we survey Connecticut, providing for the education of children in their schools, laying the foundation of religious and moral instruction in their societies, managing their subordinate concerns

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in their towns, establishing laws best adapted to the local circumstances of the state, in the general assembly, and then from a connexion with the government of the United States, obtaining the strength of a powerful nation, to secure them against foreign foes, and internal violence, we are surprised with a gradation of political institutions, that is singular and compleat. Could similar institutions be introduced into all the states of the union, the general government would be as happy as the nature of the things will admit, and as durable as time.

CHAPTER NINTH.

OF THE PEOPLE CONSIDERED AS FOREIGNERS AND NATIVES.

THE people are considered as aliens, born in some foreign country, as inhabitants of some neighbouring state in the union, or natural born subjects, born within the state.

It is an established maxim, received by all political writers, that every person owes a natural allegiance to the government of that country in which he is born. Allegiance is defined to be a tie, that binds the subject to the state, and in consequence of his obedience, he is entitled to protection. This principle is founded in the fitness of things, and nature of government. When man comes into existence, he is incapable of defending himself, and wholly dependent on government for protection; he is therefore bound by the strongest principles, to be faithful to that government to which he is indebted for such benefits.

Allegiance is either express, or implied. Express allegiance is where a subject of the state has taken that oath of fidelity to the government which is prescribed by law. An oath to support the constitution of the United States, must be taken not only by the officers of the United States, but by all the members of the state legislature, and all officers civil and military. This constitutes a public declaration of allegiance to government, and is a confirmation of natural duty: This expressed allegiance, derived to us from the oath of fealty, adopted in the feudal system, is materially varied from it, and instead of being a badge of slavery and vassalage, is an honorable acknowledgment of subjection to legal government.

Implied allegiance is that natural duty of obedience and subjection, which every man owes to that government, under whose protection he came into existence, and this duty is antecedent to, and independent of any positive engagement, and therefore, whether he swears allegiance, or not, he is equally liable to punishment for high-treason. Both these kinds of allegiance are divided into natural and local.

Natural allegiance is the perpetual obligation of obedience to government, binding on all mankind. It is a duty which they owe, and which they can never renounce and disclaim, without the consent and concurrence of the supreme power of the state. This duty is not only perpetual, but universal, and the taking an oath of allegiance to another government, does not discharge and vacate this natural obligation. It is therefore a settled doctrine that let a man remove himself into whatever country he pleases, he continues to owe allegiance to his native country, and is punishable for high treason, for joining its enemies, and levying war upon it.

Local allegiance is that subjection which every stranger, or foreigner owes to the state, while within its limits. It commences on his entering into the bounds of it, and ceases on his departure. This allegiance is therefore of a temporary nature, and results from the principle that every person owes obedience to a state, and its laws, so long as they afford him protection.

This doctrine of the common law has been adopted in all civilized nations, and no government has ever prescribed any mode by which a subject can be discharged from this natural allegiance. The doctrine of perpetual allegiance, is the law of the United States. This principle seems to be restrictive of that natural right, which every person has to remove himself to whatever country he pleases, and to join himself to such society of men, as he may choose. It would be an act of justice, as well as humanity, if nations could agree upon a certain mode by which the subject of a government could be discharged from allegiance to it, and owe that obligation only to the country to which he had removed, and where he had settled for life. But until nations will generally agree upon some uniform plan, it would be improper for any particular nation,

to subject themselves to the disadvantage of establishing a rule by which their own subjects, on abandoning their country, might be discharged of their natural allegiance, when the subjects of other governments joining them, would not be entitled to a reciprocal privilege.

All nations under greater, or lesser restrictions, have admitted of the principle of naturalization. When a foreigner becomes naturalized, he owes to the country which has adopted him, the same allegiance as a natural born subject, and at the same time is not discharged of the allegiance, he owes to his native country. The consequence is, that a man who has been naturalized, may owe allegiance to two countries, and if a war should break out between them, he may be compelled to take arms against his native country, and if captured, instead of being treated as a prisoner of war, will be legally liable to suffer death as a traitor. There are many persons who have migrated from Great-Britain, to this country and been naturalized who are in this predicament.

The congress of the United States, by the constitution, have the exclusive power, to pass laws for the naturalization of foreigners. All citizens of any of the individual states at the time of the adoption of the constitution, became citizens of the United States; but the states then gave up the power of naturalization to congress, for the purpose that it might be exercised upon the uniform and general principles, which the relative situation of the states required. Of course, all the laws of the several states respecting naturalization are repealed, and all proceedings under them are void; and foreigners must conform to the acts of congress, to become naturalized.

The states may pass laws prescribing the terms on which foreigners may be enabled to hold lands, the mode in which they shall be supported, and how they may gain such settlement, that they cannot be removed. They are only excluded from passing acts by which they become naturalized, and have the right of voting for officers of government. No foreigner, can on any terms be admitted to give his suffrage for any of the officers of government,
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till he is naturalized ; and this power of naturalization is exclusively vested in the United States.

In regard to the rights and privileges of foreigners, it may be observed, that by statute they are rendered incapable of holding lands. The general expression in the statute, comprehends title by descent, as well as purchase, but whether land purchased by or descending to an alien, shall be forfeited to the state, as in England, or whether the conveyance be a nullity, is undetermined. An alien may acquire personal property, and rent a house for his habitation, which is allowed for the convenience of commercial intercourse between nations. This personal estate he may dispose of by will, and on his decease intestate, it descends to his heirs according to law. He may bring actions against any of the citizens of the state for personal injuries, and the recovery of personal property, founded on a right originating in the state ; but it has been adjudged that our courts have no jurisdiction of contracts made between foreigners, without the dominions of the United States, tho the parties afterwards come into the state. The French by virtue of a treaty with the United States, are by statute entitled to the privileges of disposing of their estate, in this state, and on their decease, the same shall descend to their heirs, and legal representatives, according to the laws of France.

It is also declared, that the free inhabitants of any of the United States, and foreigners in amity with this state, shall enjoy the same justice and law, as the subjects of this state, in all cases proper for the cognizance of the courts of judicature.

§ 9 All ambassadors, or other public ministers to the United States, are secured in all the privileges and immunities belonging to them according to the laws of nations, and their persons, and domestic servants are exempted from arrests in civil actions. If any injury be done, to any foreign power, or the subjects thereof, in person or property, so that any damage shall result to them, or the United States, or to this state, or any particular person, such person who does the injury, shall be responsible for all damages occasioned thereby. These rights and privileges extend only to those who are alien friends, but in the case of alien enemies, during the time of

of war, they are liable to be imprisoned, if they come into the country, and their property to be taken, unless they come by virtue of a safe conduct or pass-port, and then they are protected by law from insult and injury. The children of ambassadors, tho born abroad in a foreign country, are considered as natural born subjects, because their parents are not supposed to owe a natural allegiance to the government to whom they are sent, but that which sends them, and of course their children must owe allegiance to the same power. The children of aliens, born in this state, are considered as natural born subjects, and have the same rights with the rest of the citizens.

I shall proceed to consider the mode by which persons may gain settlement in towns, and the method of proceeding against, and removing persons who are not legal inhabitants.

Our law considers persons residing here, in a threefold light: foreigners who are born in some foreign dominion: those who are inhabitants of some other state in the union: and those who are inhabitants of this state.

No foreigner can gain a legal settlement in any town in this state, unless he be admitted by the major vote of the inhabitants of such town, or by the consent of the civil authority and selectmen, or shall be appointed to, and execute some public office. In any of these ways, our law authorises foreigners to obtain legal settlements.

This statute can only be considered as making provision that foreigners may gain legal settlements in towns, so that they cannot be removed, and in case of being reduced to want, be entitled to support. And when a foreigner has complied with the conditions of the act, he gains a legal settlement only for that purpose, but the town where he gains such settlement cannot admit him to be a freeman, and to participate in the election of public officers. He must be naturalized pursuant to the act of congress, before he can be admitted to that privilege.

No person who is an inhabitant of any of the other of the United States, can gain a legal settlement in any town in this, unless he be admitted by the major vote of the inhabitants, or by the consent

consent of the civil authority and selectmen, or be appointed to and execute some public office, or unless he shall be possessed in his own right in fee, of a real estate to the value of one hundred pounds during his continuance therein. No time of residence will gain a legal settlement.

An inhabitant of one town may gain a legal settlement in another, by vote of the inhabitants, by consent of the civil authority and selectmen, by being appointed to and executing some public office, or by acquiring in his own right in fee, real estate to the value of thirty pounds. By a former law, a residence in a town one year without warning, or one year after warning without prosecution, gave a settlement. This law was soon found to be very inconvenient, and restrained people from removing from place to place, as convenience and interest required. To remedy this, provision was made that certificates might be given, by the towns from which such persons removed, which prevented them from gaining settlements in the towns to which they removed. But towns in many instances, finding an inconvenience in giving certificates, grew cautious, and it was found very difficult to obtain certificates. The removal of the people from town to town, became restricted and many inconveniences were experienced. In many towns, the principle was adopted to warn all persons who moved into them, which threw many industrious and enterprising persons, who wished to better their condition by a change of place, upon the mercy of the towns, from whence they came, to obtain certificates. The expense of warning and removing, as well as the trouble, and the disputes occasioned thereby, became alarming, and many began to think it would be better to repeal all the laws respecting settlements, and leave the towns to maintain those who happened to be reduced to want, within their limits, than to vex and embarrass mankind by such restriction, on the rights of removing themselves according to their interest and wishes. But the danger that some inhuman and unjust acts might be done by towns, in attempting to throw the burden upon other towns, prevented the adoption of this plan. The necessity however pointed out another plan, which while it gives individuals the liberty of removal, takes away from towns the temptation to practice fraud on each other.

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f In 1792, a law was passed, which provided that any inhabitant of any town in this state, by himself, or with his family, may remove into another town, and continue therein, without being liable to be warned to depart, or to be removed therefrom, and shall gain a legal settlement in such town, in case he shall reside there for the term of six years, and shall support himself and family, without becoming chargeable to such town, or the town liable to support him, but if he be unable to support himself and family at any time before the expiration of the six years, and become chargeable to the town, that is liable to support him, he, and his family may be removed to the last place of his legal settlement. This law gives to the industrious and prudent man, a fair chance to change his residence, as his interest may require, and no town can be under any temptation to shift off their poor upon another, because such poor must support themselves six years, before they discharge the town from their liability to support them.

I shall next consider the settlements of infants, and married women.

An infant can never acquire a settlement; but he belongs to the place of his father's settlement, unless in the case of a bastard, and then his settlement is the same with his mother. If a woman be delivered of a bastard child in a town where she does not belong, her place of settlement will be that of her child. An apprentice being a minor, gains no settlement by residence with guardian or master.

If a woman marries a man who has a settlement in any other of the United States, she shall follow the settlement of her husband, tho she has never been there.

u A wife, during her marriage, can gain no settlement separate and distinct from her husband.

w If a woman having a settlement marries a man that is a foreigner and has none, her settlement is suspended during coverture, and his continuance with her. If she be reduced to want during the continuance of her husband with her, she cannot be sent to the place

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f Statutes .420.

z Canaan vs. Salisbury, S. C. 1790.

z Town of

Salisbury vs. Fairfield, S. C. 1789.

u Law of Women, 99.

Burne's

Justice, Art. Poor.

w Ibid.

of her settlement, because as it is not the settlement of her husband, he cannot be sent with her, and the law will not admit the separation of husband and wife. They must both be considered as vagrants wherever they are, and may be treated as such, and of course may as well be in one town as another. But if the husband dies, or leaves her, then her settlement revives, and the suspension ceases; for the law will not admit that a person, who has a settlement, shall lose it till another is gained. In such case therefore, the wife may be sent to her place of settlement, before the marriage, and all her children, wherever they were born, will follow her settlement. These rules apply only to foreigners, and not to persons who are inhabitants of any of the other states in the union. These principles were settled in the two following cases.

* A foreigner residing in the town of Windham, married a woman whose settlement was in Norwich. Several children were born, and the husband left the wife, and went to some place unknown. The selectmen of Windham, procured the wife and children to be transported to Norwich, for which an action was brought against the town of Windham. The superior court adjudged that the desertion of the husband, from the wife, had revived her right of settlement, which was suspended during his continuance with her, and that as the children could gain no settlement by themselves, they must follow the mother.

y A woman that had a settlement in Windham, was certificated to Norwich, where she married a man who had a settlement in Norton, in Massachusetts. Her husband removed her out of the state, and left her, and by various removals she came to Norwich, who transported her to Windham, for which action was brought. On the trial it was contended on the part of Norwich, that as she once had a legal settlement in Windham, and a certificate thereof had been given to Norwich, that they had a right to send her to Windham, and if she did not belong there, they were bound to look out for her settlement; that she had married a man who had no settlement in this state, and as he had left her, she might be sent to her place of settlement in this state, before her marriage, on the idea that the same principles would apply to her husband, as

if

* Town of Norwich vs. Town of Windham, S. C. 1790. y Windham
vs. Norwich S. C. 1792.

if he was a foreigner : but the superior court sustained the action, and adjudged that the woman by marrying an inhabitant of another state, lost her settlement in Windham, and followed the settlement of her husband, who could not be deemed in the light of a foreigner ; and that therefore she ought to have been sent to the town where her husband belonged, whether he was there or not.

The statute law has provided for the removal of persons from towns, where they have no legal settlement ; and for their punishment in case they continue to reside therein, after having been warned to depart.

* A foreigner likely to become chargeable to the state, or who is of an immoral, or vicious character, may by order of the county court, or an assistant, and justice of the peace, or two justices (quorum unus) be transported to the place of his legal settlement, or to some place, within the jurisdiction of the state, or Nation to which he belongs, whenever such authority shall judge it expedient, and that the expence will not exceed the advantage, to be paid by the state if such person be unable.

a If any person who is an inhabitant of any other of the United States shall come to reside in any town in this state, the civil authority, or major part of them are authorised upon application of the selectmen, if they judge proper, by warrant under their hands, directed to either of the constables of said town, to order such person to be conveyed to the State, from whence he came, at the expence of such town.

b If an inhabitant of any town shall reside in another, and within the term of six years shall become unable to support himself, and family, and become chargeable to the town liable to support him, he may be removed in like manner ; and where persons removed as aforesaid shall return back to the town, from which they were sent, and abide therein, after warned to depart, they shall be whipped on the naked body, not exceeding ten stripes, and may be removed as often as there shall be occasion.

c The selectmen of any town, are authorised by themselves, or by warrant from an assistant, or justice of the peace to warn any foreigner

* Statutes, 82.

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a Ibid. 383,

b Ibid. 383, 420.

c Ibid. 383.

foreigner, or person belonging to any other of the United States, not having become inhabitants of such town, to depart the same, and the person so warned shall forfeit, and pay to the treasurer of such town, ten shillings per week, for every week he shall continue therein, after warning, and if unable to pay shall be whipped on the naked body, not exceeding ten stripes, unless he shall depart the town within ten days after sentence given, and reside no more therein without leave of the selectmen.

If any inhabitant of any town, shall hire, or entertain, or let any house, or land to any foreigner or inhabitant of any other of the United States, unless he first give security to the acceptance of the authority and selectmen, to save the town harmless from expense, shall forfeit, and pay to the treasury of the town, ten shillings per week. The selectmen are directed, and empowered to prosecute all breaches of the act.

By the statute removals are by warrant and not by order. The law has not vested any description of men with the power of making an order, for the removal of a pauper, and then given the liberty of an appeal from such order to the town where such pauper is removed, in case they dispute his settlement in such town, and wish to try the question. When a pauper is sent to a town, to which he does not belong, such town has a right by warrant to remove him to his place of settlement, but may not return him to the town from which he was sent, unless it be his place of settlement. But in all cases where a town removes a pauper, to a town of which he is not an inhabitant, an action of trespass on the case will lie in favor of the injured town, by which the place where the pauper is legally settled can be ascertained. But as towns are sometimes unwilling to commence actions, paupers have sundry times been removed between towns, before an action was commenced, by which they were much distressed, and injured. It would therefore be more consistent with humanity, and justice, to authorize certain authority to make orders of removal, and then if any town contested their validity, give them an appeal to some superior jurisdiction, where the right of settlement could be fairly, and definitively determined : and not permit towns to harass the
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poor by sending them backwards, and forwards, as long as they pleased, till they are disposed to settle the question legally.

d If any person shall by reason of sickness, in any town where he does not belong, occasion a charge to such town, the selectmen shall lay the account thereof before the county court in the county, where the town is to which such person belongs, who having adjusted, and allowed the same, as they think reasonable shall order payment thereof by the treasury of such town, or in want thereof by the selectmen, and award execution accordingly; provided that such person be unable to support himself, and has no master, or relations liable to support him.

e In all cases where a town have incurred any expense in providing for the support of a pauper, belonging to another town, action of assumpsit will lie at common law notwithstanding the provision of the statute, to recover such expense, and this is the most usual method to decide the legal settlement of paupers.

Formerly where a pauper was to be removed to a distance, he was sent by constables from town to town, to the place of settlement; *f* but now the town removing him, must send him to the place where he belongs. A practice was once introduced of transporting paupers through the state, by constables from town, to town, where they wished to send them from one state to another, as from New-York to Rhode-Island, but to save such expense, the statute law provides, that any person who shall bring any poor and indigent person, into any town in this state, of which he is not an inhabitant, and leave him there, shall forfeit twenty pounds to the use of such town.

d Statutes, 228. *e* Town of Thompson vs. town of Wallingford, S. C. 1791. *f* Statutes 420.

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BOOK SECOND.

Of the Rights of Persons.

CHAPTER FIRST.

OF RIGHTS IN GENERAL.

IN the first book of our enquiries, we have treated of the constitution and form of government, established to support the rights and redress the wrongs of the people. The power and duty of every person who acts in a public capacity, have been fully delineated, and the jurisdiction of courts that administer justice, has been clearly defined. We come next to consider the rights of individuals, the preservation of which, is the highest duty of public officers, and the ultimate object of legal government. For the more accurate comprehension of this subject, it is proper to observe that persons may be branched into several divisions. Persons are public and private. Public persons have already been considered as being the instruments by which government is maintained and executed. Private persons are the subjects of government, and derive from it, the exercise and enjoyment of certain rights and privileges. Persons are again divided into natural and artificial. Natural, are such as are formed by the hand of nature. Artificial, are such as are formed for the purposes of society, as corporations, and bodies politic.

When we consider man, as the subject of civil law, we are to
contemplate

contemplate only certain rights, from the peaceful enjoyment of which results the highest happiness which he is capable of attaining. If the exact extent of these rights were indisputable, and the observance of them held sacred and inviolable, there would be no necessity of law or government. But the different ideas of mankind respecting right, and the general propensity to infringe it, have laid the foundation of civil institutions. This infringement of right is denominated, wrong. When we have ascertained the rights, we easily see, that the deprivation, or violation of them constitute those injuries or wrongs, which it is the object of courts to redress. The restoration of these rights, when taken away, and the restitution of adequate compensation, when violated, are those exercises of government which are denominated, justice.

Rights are of a twofold nature, absolute, and relative. Absolute rights belong to men in their individual capacity. These are three, and are denominated the rights of personal security, personal liberty and private property. Relative rights respect mankind in their social connection with each other. These are the relations of husband, and wife ; parent, and child ; guardian, and ward ; master, and servant.

While we are contemplating the rights of man, it may with propriety be remarked, that they are divided into natural and civil. Natural rights are such as appertain to individuals in a state of nature—Civil rights result from the institution of society—But it must not be imagined that natural rights are essentially different from civil, for the natural rights are the basis of civil. Natural rights consist in our possessing, and enjoying the power, and privilege of doing whatever we think proper, without any other restraint than what results from the laws of nature—The inconveniences that mankind have experienced in this situation, has induced them to enter into the social state, by a resignation of some portion of natural rights, for the purpose of acquiring complete security for civil rights.—Natural Rights are converted into civil by subjecting them to certain restrictions and limitations, by which they are rendered secure, and permanent. Civil rights may therefore be defined to be the exercise and enjoyment of natu-

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ral rights, in that limited qualified manner, which is prescribed by law and is necessary to their security, and the peace and good order of society, and by reason of which, he acquires certain other civil rights, resulting from the social state. When an individual resigns part of his natural liberty, to a superior, he thereby gains the aid and assistance of that superior, in guarding and defending his right of civil liberty, against all illegal encroachments. When a man submits to the rules and forms of law, in the acquisition of property, he finds those rules and forms render the enjoyment of it safe and permanent.

Our entering into a state of society, does not restrict us in all our natural rights, but many are left untouched. Mankind are restricted from injuring each other in person, character, and property; and are inhibited from committing certain crimes, which endanger the existence of society. But they possess all the freedom of the natural state, in the exercise of the acts of humanity, generosity, and benevolence: in the formation of the connexions of friendship, and in that intercourse between each other, which constitutes the manners of the country. The rules of conduct are derived from common opinion and general custom. Nations are not less distinguished by the refinement of manners, and the progress of civilization, than by their laws and government. This subject belongs however to the investigation of the moral character of man; but as these enquiries respect him only in his civil capacity, I shall consider those rights only which are denominated civil, and the violation of which is punished by compelling the wrong doer to make reparation to the party injured.

CHAPTER SECOND.

OF THE RIGHT OF PERSONAL SECURITY.

PERSONAL security consists in a man's having the peaceable enjoyment of life, limbs, body, health, and reputation.— 1. The preservation of life is an object of the first consequence in all governments, and the taking of it away is punishable with death. To the person injured, no reparation can be made, and therefore the

public only can prosecute the offender. In England, an appeal is given to the wife, or son of the deceased, against the murderer, who on conviction, cannot be pardoned: but here, no such mode of prosecution has been admitted. *g* The law regards an infant even in the mother's womb, and if it be in any way killed, it is a great misdemeanor. It is also capable of taking a legacy, and an estate limited to its use.

Life is the gift of God, and the most important right that mankind enjoy. No man has a right to dispose of, or take away his own life, nor may it be destroyed by any of his fellow creatures, on their own authority; but as it has been found necessary to maintain civil government, that the power of taking away life, for the commission of certain crimes, immediately tending to its dissolution, should be vested in the supreme power of the state, it has therefore become a principle in all countries, that the legislature may inflict the punishment of death, on certain crimes of the deepest dye. The law has not only established those bulwarks to guard this sacred right, but has authorised individuals to exert their own strength and power, to defend their lives when attacked, and they may legally take away the lives of the assailants, to save their own. A man may avoid a contract, into which he is compelled to enter, through fear of losing his life.

2. *b* The preservation of a man's limbs, is an object attended to by law, and especially the eyes, tongue, and privy-members, being those limbs which are of the highest consequence in the enjoyment of life. The destruction of them is denominated, mayhem, and the crime is by statute, punishable with death. *i* By the common law, mayhem extends to all limbs that may be useful to a man in fight, and the crime is punishable with death: but the mildness of our statute has moderated the rigor of the common law. The law not only guards the limbs of a man, but he has a right to take away the life of another, in defence of either of his members. As the loss of a member is irreparable, the law will not oblige a person to suffer it, but will authorise him to defend it, at the expense of the life of the assailant; but to avoid a mere battery the law will not authorise the commission of homicide, because, com-

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g 1 Black. Com. 130. *b* Statutes, 67. *i* 1 Black. Com. 130.

penfation can be made for the injury. A man may avoid a contract which he makes, through a well grounded fear of mayhem, or loss of limb, which is called duress by threats.

3. * Not only is a man protected against loss of limb, but the body and the limbs, are protected against all menaces, assaults, beating, and wounding. Such acts are a breach of the peace, and punishable by fine. The person injured, has an action of trespass for assault and battery, against the wrong doer, to recover damages for the injury he has sustained. This security of our body and limbs, from all corporal injuries, is an inestimable right. When we come to consider the various kinds of actions, to obtain redress for injuries, we shall specify those acts, which are an infraction of this right, and for which a remedy is given.

4. The preservation of health, so essential to the enjoyment of the blessings of life, is regarded by law. An action lies for a person to recover damages for any injury he sustains in that respect. The legislature have been careful to preserve the health of the people, by preventing the introduction of contagious disorders, and their spreading when introduced.

5. A man's reputation and good name, is secured from slander, detraction, and defamation. A good character, is the source of some of our highest enjoyments, and the preservation of it from the blast of envy, and the tongue of malice, is one of the most essential benefits we derive from society. Whoever attempts to wound the reputation of another, by speaking slanderous words, spreading defamatory reports, publishing scandalous libels, or exhibiting ludicrous pictures, shall answer to the party injured all damages that he sustains, by such unjustifiable conduct.

The nature and extent of these rights will be easily comprehended by this concise description. It is difficult to say much about them, without taking into consideration those acts, which amount to a violation of them. This belongs to that part of our enquiries, that relates to personal wrongs, and their remedies, which must be deferred, till we treat of that subject, and then this point will be resumed, and largely discussed.

* 1 Black. Com. 134.

CHAPTER THIRD.

OF THE RIGHT OF PERSONAL LIBERTY.

THIS sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this state in as full extent, as in any country on the globe, and in as high degree as is consistent with the nature of civil government. No individual, or body of men, have a discretionary, or arbitrary power to commit any person to prison; no man can be restrained of his liberty; he prevented from removing himself from place to place, as he chuses; he compelled to go to a place contrary to his inclination, or be in any way imprisoned, or confined, unless by virtue of the express laws of the land. These laws are so clear and explicit, that it is in the power of every man to avoid breaking them, and if he be committed to prison, it must be the effect of his own fault.

In matters of a criminal nature, tho every offender may be apprehended by private persons, yet they must be immediately carried before proper authority, complaint must be entered by some informing officer, the court must make enquiry respecting the truth of the accusation, and if a probability of guilt appears, the offender may be committed to prison, and held for trial. But without such a proceeding, no criminal can be imprisoned, and even then it can be done only for capital offences; all others being bailable; and the criminal will not be imprisoned, if he be able to procure bail. If the offence be not bailable, or the criminal unable to procure bail, he committed to prison, there are courts of law constituted for the trial of all offences, which sit so frequently, that a person can lie in a prison but a short time, before he will have a fair opportunity of manifesting his innocence, or of being proved guilty, and obtaining his enlargement, by suffering the punishment that his crime deserves.

How different is this from the practice of all despotic governments. There the monarch has power to commit a man to prison, upon any pretence whatever, and there detain him so long as he pleases, without bringing him to trial; nor is there any method for the subject to obtain his liberty, enlargement, or trial, without

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the content of the despot. Many instances have happened, where innocent persons who had rendered themselves obnoxious to a tyrant, have been confined for years ; and have even languished out their miserable lives in the solitary mansions of a prison, destitute of the comforts and pleasures of life, and secluded forever from the company and conversation of their families, their friends and the human race. To what a state of degradation and meanness, must the minds of men be reduced, to be quiet and peaceable amidst the terrors and cruelties of such a government. How enviable is our situation, when compared with almost every country on the globe, and how much reason have we, not only to be obedient to our laws, but to exert every power to defend and maintain a constitution which will render us the freest and happiest nation in the world, if we have a disposition to enjoy those privileges which Heaven has bestowed upon us.

No person can be imprisoned in cases of a civil nature, if he be able to pay the debt. If he be unable, he may be imprisoned by precept from lawful authority. If a man will be so imprudent as to involve himself in debts, that he cannot discharge, he must suffer imprisonment, as a consequence of his imprudence and folly. But even then, if he can procure bonds, he may enjoy certain liberties adjacent to the prison, and is not subjected to the horrors of close confinement. If he be so poor that he cannot pay the debt nor support himself, the law allows him to take an oath, that he has not estate to the value of five pounds, on which he shall be discharged from prison, unless the creditor furnishes him with support.

Every confinement of a person, in any shape, is called an imprisonment, and if it be done without legal authority, it is false imprisonment. The legality of imprisonment, consists in its being done by process, precept, or warrant, from proper authority, having power to commit ; which must be in writing, signed by such authority, and expressing the cause of commitment..

If a man be illegally restrained of his liberty, an action of trespass will lie to recover damages, and if he be compelled to execute a contract, to obtain his liberty, he may avoid it. This is called *duress*

duress by imprisonment : but if a man be lawfully imprisoned, and execute a contract to obtain his discharge, then such contract will be binding.

CHAPTER FOURTH.

OF THE RIGHT OF PRIVATE PROPERTY.

THE original right to property is founded in the nature of things. It consists in the power of using and disposing of it, without controul. But in a state of society, it became necessary for the mutual convenience of mankind, that this natural right should be laid under certain restrictions and limitations. We therefore do not appeal to the laws of nature for the title to the property we possess. This would open the door to endless controversies and disputes, and would be in a measure reverting to a state of nature. But that property may be upon a certain, permanent foundation, there have been certain positive rules adopted by mankind, which govern the acquisition, the use, and the disposition of it. These are calculated to give the possessors a more perfect enjoyment, than can be derived from natural law, and thereby compensate for those rights which are resigned, upon entering into society.

The laws of this state respecting property, are founded upon principles of justice and good policy, and secure to the people, the most enlarged powers and privileges. Every man in the exercise of common reason, is capable to acquire property, to use and improve it in such manner as he thinks fit, if he injures no other person, and to convey, transfer, and dispose of it as he pleases, in conformity to certain rules and regulations prescribed by law. Every person has a clear title to the property he acquires, in his own right, independent of any superior whatever, and no one can deprive him of it, without his agreement and consent, unless by force of express law. There is no supreme authority, that possess an arbitrary power to take away the property of any person without his consent, express or implied, even for the support of civil government. The general assembly who are elected by the
people

people, and to whom they delegate the power of consulting and acting for the general good, have a right to impose taxes upon the people, for the purpose of defraying the necessary expenses of government. But as they are the representatives of the people, the people do in fact virtually assent to every tax that is granted, and thereby have a compleat security against all unreasonable and unnecessary impositions of public burdens.

It would be a matter of curiosity to compare our condition, with the greater part of the nations of the earth. In some of the most fertile countries of Asia and Africa, where the spontaneous productions of nature, furnish the inhabitants, with all the luxuries and elegances of life, the despotism of government, has rendered them compleatly wretched and miserable. The title to their property is dependent on the arbitrary will of the master, and all the wealth they can accumulate, is perpetually exposed to be taken from them, by the hands of the rapacious vultures that govern them. Under such a government, genius droops, industry languishes, woe and misery reign triumphant, and happiness is banished from the land.

CHAPTER FIFTH.

OF HUSBAND AND WIFE.

THE connexion between husband and wife, constitutes the most important, and endearing relation, that subsists between individuals of the human race. This union, when founded on a mutual attachment, and the ardor of youthful passions, is productive of the purest joys and tenderest transports, that gladden the heart.

This connexion between the sexes, has been maintained in all ages, and in all countries; tho the rights and duties of it have been very various, as well as the modes and ceremonies, by which it is contracted. / The most general principle that has been adopted is that a man shall have but one wife,—but in the southern climates, and in the countries where the dreary religion of Mohamed has prevailed, polygamy has been introduced, the women have been treated as slaves, and considered as merely the objects of lust and

and sensuality. The manners of the people, in consequence of this practice, are barbarous, unpolished, and unsocial. Among savage nations, the women are treated as beings of an inferior order, and are subjected to all the rigor and hardship of slavery. The progress of nations to civilization and refinement of manners, is marked by an encreasing attention to the female sex, and society may be said to have arrived to the highest point of improvement, when the charms of their beauty and the softness of their virtues are united in bestowing the sweetest joys on domestic life, when they are considered as the equal companions and friends of the other sex, and when the intercourse of the sexes is regulated by sentiments of decency, delicacy and propriety. Perhaps no country has a better right to boast of this state of manners, than America.

Marriage has been deemed a civil contract, in all countries, excepting where the christian religion has flourished. When this religion was established, marriage was taken under its special guidance and direction, and the union of the two sexes was considered in a very different light from what it was considered by the Pagan nations. Such are the extravagant absurdities which have been adopted that it is a truth, that the doctrine has been holden, that a man who has tasted the purest domestic pleasure, in the arms of a virtuous and lovely wife, becomes polluted, and unfit to minister in holy things, at the altar of God, and that the abstaining from those endearing pleasures, to enjoy which we are impelled by the strongest propensity of the human heart, is the most acceptable sacrifice to that Being, who created us, and implanted in us the very principles that this doctrine counteracts. From this source has flowed the celibacy of the clergy and the monastic institutions, where a perpetual warfare between mistaken duty and natural passion, has rendered these victims of superstition, the most wretched of mortals.

The Roman catholics have advanced the contract of marriage to the dignity of a sacrament, and rendered it a powerful and successful engine, to promote the aspiring views of the clergy. In England, marriage is considered in a great measure, as a matter of spiritual jurisdiction. The law points out certain modes to be pursued

sued to compleat the contract, and deduce the consequences resulting from it. But the celebration and dissolution of it, and the punishment of all crimes respecting it, are left to the ecclesiastical courts, who punish only for the good of the soul.

But in this state, we have happily thrown off those shackles which the devices of men had invented to render mankind miserable, under the pretence of rendering them religious and preparing them to be happy. This contract, by our law is considered merely in a civil light, and the clergy have no power, but to celebrate the marriage, by virtue of express law, in the same manner as the civil magistrate. All crimes that can be committed by an unchaste and illegal intercourse between the sexes, are punished by the courts of common law.

For a clearer comprehension of this subject, I shall distribute it under the following heads :

- I. How the contract of marriage may be made, and published.
- II. How it may be dissolved.
- III. How it operates upon the acts of the wife, previously done, and of agreements between them during marriage.
- IV. The power which marriage gives the husband, over the estate of the wife.
- V. How far the husband is chargeable with the debts of the wife, contracted before, or after marriage, and of a wife who is executrix, or administratrix.
- VI. When a husband and wife must join in suing, and be joined when sued ; and when the wife may sue, or be sued as a single woman.
- VII. Of the power of the husband over the person of the wife, and her remedy for any injury done her, by him.
- VIII. How far the acts of the husband, or wife, alone, or jointly with the wife, will bind the wife.
- IX. Of the crimes of the wife, where she alone shall be punished

ished, and where the husband is answerable for what she does in a civil action. Of each of these, I shall treat in their order, and,

I. How the contract of marriage may be made, and published. Under this head, it must be observed, 1. That the parties must be of ability and capacity to contract. 2. They must in fact make a contract, and 3. The contract must be executed and published according to the forms and ceremonies required by law.

1. In regard to the ability of persons, it must be noted, that in general all persons have the power, unless they are disqualified by some particular disabilities or impediments.

1. Want of age incapacitates persons to make this contract. ^m The age of consent is fourteen for boys, and twelve for girls; if they marry under those ages, the marriage is imperfect, and the parties when they arrive to the age of consent, but not before, may agree to the marriage, which renders it valid without further celebration, or disagree which renders it void. If one of the parties be above, and the other under the age of consent, then the party above such age, may disagree, as well as the other, for both must be bound, or neither; but such party cannot disagree, before the other arrives to the proper age.

2. Consanguinity and affinity, between persons, disqualify them to make this contract. ⁿ The statute law which is copied from the Levitical law, prohibits all persons within certain degrees of propinquity, by blood or marriage, from intermarrying, declares void such marriages, bastardizes the issue, and punishes with great severity, such incestuous conduct. ^o All marriages between persons related in the ascending or descending line, to the remotest possible degree are prohibited, on the principles, that such incestuous connection is repugnant to the law of nature, for the mother would never preserve and educate the female issue, if the father might have access to them, nor the father the male issue, if they might ascend the bed of the mother: that it destroys the natural duties between parents and children; for the parent could never maintain that authority, which is necessary for the education and government of the child, nor the child

^m 1 Black. Com. 436. 1 Bac. Abr. 228. 3 Ibid. 119. Co. Lit. 79.
ⁿ Statutes, 136. Lev. xviii. ^o 3 Bac. Abr. 571.

child that reverence that is due to the parent, if such indecent familiarities were admitted : and there seems to be the same natural reason, which exists in the brute creation, that it is necessary to cross the strain, to continue the species compleat : for there may be the same tone and figure of blood, and a similar conformation of vessels, between near relations, which would render their issue torpid and inactive. While a new mixture of others of the same kind, where there is a different figure and motion of the blood and spirits, may add a new vigor, and ability to the animal œconomy.

The prohibition of marriage among collateral relations, extends to the third degree, and tho the reason be not the same, as among lineal relations, yet the law is founded in good policy. The marriage of brothers and sisters, who must be educated together, and of uncles and aunts, with nephews and neices, who from the nearness of their relation must be familiar with each other, would open the door for such frequent and convenient opportunity for every species of lewdness and debauchery, that a universal corruption and depravity of manners would follow, and chastity and innocence be banished the world. Every family would be confined to itself in the exercise of licentiousness and wickedness ; for such conduct would prevent the extension of family connections : a friendly intercourse which polishes and improves the manners of mankind, would cease to connect the different members of the community, and the diffusion of love and charity, would no longer augment the happiness of mankind.

The extension of the prohibition of marriage to relations by affinity, is grounded on the idea that husband and wife become one person. It is true that the human heart does not feel that natural horror, and aversion against a connection with persons related by affinity, as consanguinity, but so far as the same danger of debauchery of manners arises from it, there is undoubtedly a propriety in extending the prohibition.

3. *p* A prior marriage, or having a husband or wife living at the same time, disables persons from making this contract. If they attempt it, the marriage is void, and they are liable to severe punishment.

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4. *¶* A want of reason is another disability. An idiot is wholly incapable of entering into a matrimonial contract, so is a lunatic, unless in a lucid interval. But if the misfortune to be deprived of reason happen to a person after marriage, there is no provision in law to annul it.

5. *¶* When the parties are within age, the law requires the consent of the parents and guardians (if any) of such persons, as are under the care and controul of parents and guardians, upon penalty that any persons who have a right to perform the ceremony of marriage, shall pay a fine of twenty pounds, if they marry persons without the consent of the parents and guardians; one half to any common informer, and the other to the county treasury; but the marriage however is valid.

2. *¶* The parties must in fact make a contract, which arises from their mutual agreement and consent, when they labor under no legal disability, for it is not a familiar intercourse between the parties, but their consent, that constitutes the contract. By the law of nature, and by the imperial or civil law, a mutual contract, as I marry you; you and I, are man and wife, is a marriage in fact, which the parties cannot release but by mutual agreement. A promise to marry in future, would by the cannon law be enforced in the spiritual court; but either party could release it, and marriage to another, dissolved it. But by our law no act of the parties alone can make the marriage valid, and no court can compel the specific performance of a marriage contract; but these contracts are so far countenanced by our law, that if either party refuses to fulfil an executory contract of marriage, an action will lie in favor of the injured party, for the recovery of damages, and courts have sometimes given large damages in such cases. But here the special circumstances of the case must be taken into consideration. If the plaintiff be a woman of a fair character, and the consequence of the promise was her seduction, then the most exemplary damages ought to be given, to make all possible reparation for the greatest injury that a woman can sustain. These promises are good tho no time be agreed on, but it is necessary to entitle the party to an action, to aver an offer of marriage and refusal. It has been de-

termined

¶ 1 Black. Com. 438. *¶* Statutes 136. *¶* 3 Bac. Abr. 573. *¶* Ibid 74, 575.

terminated that marriage is an advancement and benefit to a man, and that of course he may bring an action for the breach of a marriage contract. The action must be founded on mutual promises, for if it be on one side only, it is a naked agreement, and not binding.

u If a man of full age, and a girl of fifteen, promise to intermarry, and the man be guilty of a breach of contract, an action will lie against him in favor of the woman, for tho the contract was voidable as to her, yet the man shall be presumed to act with sufficient caution, otherwise the privilege allowed to infants, to rescind their contracts, which was intended for their benefit, might operate to their prejudice.

3. This contract must be published and executed according to certain forms, and ceremonies prescribed by law.

u Before a marriage can be legally celebrated, it is requisite that the intention of the parties be published in some public meeting or congregation, on the Lord's day, or on some public fast, thanksgiving or lecture-day, in the town, parish, or society, where the parties, or either of them ordinarily reside, or such intention be set up in writing, upon some post or door of their meeting-house, or near the same in public view, there to stand so as to be read, eight days before the marriage.

Magistrates, justices of the peace in their own county, or jurisdiction, ordained ministers in the county where they dwell, and during the time they continue settled in the work of the ministry, are only vested with the power of joining persons together in marriage, and an attempt by persons of any other description is void, and ineffectual.† These regulations have been thought necessary for the purpose of rendering this contract, which is of so much consequence to civil society, more serious, solemn and deliberate, to give notice to parents, and all who are interested, of the intention of the parties, so that measures may be taken to prevent it, if unwarrantable or illegal, and to stop all private and clandestine marriages; but if the marriage be celebrated without consent or publication, it is valid, and the performer only liable to the penalty.

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u 3 Bac. Abr. 574. *u* Statutes, 136.

† An erroneous opinion has prevailed, that any person not a minister, or justice of the peace, may join persons in marriage, but this opinion is clearly against law, as well as the decisions of the superior court.

The law has not pointed out any mode in which marriage shall be celebrated ; but has left it to the common custom and practice, which has been established from time immemorial. But it may be observed, that any form of words which explicitly constitute a contract and engagement from the parties to each other, and published in the presence of, and by a legal officer, will amount to a marriage according to law.

II. We consider how the contract of marriage may be dissolved.

Before the establishment of christianity, and in all countries where that religion has not been received, the contract of marriage, has not been considered of an indissoluble nature ; but divorces have been allowed upon a variety of principles. In the rude ages of society, when the manners are rough and unpolished, wives are deemed to be the slaves of their husbands, and they have the power of divorcing them at pleasure. As the manners of the people improved, the laws introduced some regulations, to restrain the unreasonable exercise of this arbitrary power ; but even in the most polished periods of the Grecian and Roman States, divorces were admitted on the most trifling pretences. As the manners of the people became more polished, the condition of wives grew more tolerable, and they were allowed the privilege of obtaining divorces, as well as the men. In the early and virtuous period of the Roman republic, it is remarked as an evidence of the purity and simplicity of their manners, that notwithstanding the facility of divorce, there did not happen an instance for the space of five hundred and thirty years. Moses, the inspired legislator of the chosen people of God, has declared, that if a man marry a wife, and she find no favor in his eyes, by reason of some uncleanness, he may give her a bill of divorcement, and dismiss her from his house. The vesting in the parties, the power of divorce upon such trivial pretexts, must have opened the door to every species of debauchery and wickedness. It destroys all that restraint upon the conduct of married persons, which is imposed by the consideration, that they cannot dissolve the connection. It inflames those trifling controversies, which so often happen, and lessens the necessity of exercising mutual charity and forbearance. It cherishes the natural propensity

penalty to variety, by facilitating the means of obtaining it. The holy author of the christian religion, in purifying the Mosaic institution, has adopted sentiments of a very different nature. Two of his evangelical historians, ascribe to him a prohibition of divorce in all cases, and one qualifies the prohibition by the exception of one crime, described by a word of doubtful meaning in the original, but which according to the vulgar translation, cannot be committed by a woman after marriage. Hence all the christian nations immediately admitted the doctrine, that divorces are repugnant to the positive precepts of the religion which they profess, and of course they have been prohibited in all cases, except for reasons existing prior to the marriage, which rendered it void. In England, in cases of adultery, a divorce from bed and board only, is allowed, which prevents another marriage. The reformation which relieved mankind from so many unnecessary restrictions, upon their happiness, produced no alteration about divorces. The rendering the contract of marriage indissoluble, is running into the opposite extreme from that of permitting divorces at the pleasure of the parties. There are many persons, who on the idea that the marriage contract cannot be vacated for any misconduct they are guilty of, will not behave with that propriety that they would if the continuance of the contract were dependent on their exertions to render themselves agreeable to the persons with whom they are connected. It is a great hardship that a person who has been unfortunate in forming a matrimonial connection, must be forever precluded from any possibility of extricating himself from such a misfortune, and be shut out from enjoying the best pleasures of life. This consideration, instead of adding to the happiness of the connection, must frighten persons from entering into it. It is therefore the best policy to admit a dissolution of the contract, when it is evident that the parties cannot derive from it the benefits for which it was instituted; and when instead of being a source of the highest pleasure, and most endearing felicity, it becomes the source of the deepest woe, and misery.

In this state the legislature has wisely steered between the two extremes. We neither admit that marriage is indissoluble, so as to involve a person in wretchedness for life, who is unfortunate in forming

forming a matrimonial connection ; nor do we allow it to be dissolved upon such slight pretences, as give the parties the power of releasing themselves from it, when whim, caprice, or a relish for variety shall dictate. Substantial reasons only, which shew that the design of marriage is defeated, will have influence, and the validity of these reasons must be judged of by a court of law, and not by the party themselves. The institution of a court for the decision of such controversies, and the limitation of their power to such cases as the public good requires to be remedied, gives the practice adopted by our laws, a decided preference to the practice of all other nations, and renders our mode of granting divorces, as favourable as the other modes have been unfavourable, to the virtue, and the happiness of mankind. The wisdom and good policy of this law, is evidenced by the consideration that in no country, is a greater share of domestic felicity enjoyed, than in this state.

* Bills of divorce may be granted by the statute respecting such cases, for adultery, fraudulent contract, wilful desertion for three years, with total neglect of duty, or seven years absence of one party not heard of. The practice has been to grant women divorces, where their husbands have been guilty of a criminal connection with unmarried women, which crime tho by law amounting only to fornication, has been included under adultery. Application must be made by petition to the superior court, stating the reason for the divorce, and twelve days notice must be given to the opposite party if within this state. On proof of any of the above recited facts, the superior court will grant a divorce to the aggrieved party, who is then deemed and accounted single and unmarried, and may lawfully marry, or be married again. The reasons of divorce by statute are such, as arise subsequent to the marriage, excepting in the case of fraudulent contract. The issue, however, in no case will be bastardized by the divorce, because the marriage is legal and valid, till annulled, not absolutely void, but only voidable. In cases of incestuous marriage and bigamy, they are absolutely null and void, and of course the issue are bastards.

y The superior court have power to assign to any woman so separated, such reasonable part of the estate of her late husband,

as

* Statutes, 41,

y Statutes, 137,

as in their discretion the circumstances of his estate may admit, not exceeding one third.

* By the common law of England, corporal imbecility, frigidity, or perpetual impotency, existing prior to the marriage was a ground of divorce from the bond of matrimony. In our statutes, nothing is mentioned of this reason, tho perhaps it may be comprehended under the idea of a fraudulent contract—for we cannot form an idea of a greater fraud, than for one person to marry another when labouring under a perpetual incapacity to perform the essential duties of the contract. But this point remains to be settled in future, as no application has ever been made on this ground to the superior court.

Such is the power delegated by the legislature to the superior court; but they have reserved to themselves, the power of granting divorces in other cases. Frequent applications are made to the legislature for such purposes, and it seems to have been adopted as a general rule, that in all cases of intolerable cruelty, and inveterate hatred, and such gross misbehaviour and wickedness as defeat the design of marriage, and presumptive proof of a criminal connexion with another person, where the positive proof required by law cannot be had, divorces may be granted. The reasons for which the legislature grant divorces, are clearly warranted by sound policy. It would however be less expensive to the state, and equally safe for the community to delegate the same power to the superior court.

The Statute warrants no divorce from bed and board, but all divorces must be in total, and from the bond of matrimony.—The legislature however, in one instance under the special circumstances of the case, have granted a divorce from bed and board. This precedent ought not to be imitated, for it is placing them in a situation, where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity, or more virtue than usually falls to the share of human beings.

III. The operation of marriage on the acts of the wife, previously done, and of agreements between them during marriage.

a The husband and wife in legal consideration are one person, her existence is united with and swallowed up in that of the husband. This union of the husband and wife, operates as an extinguishment, or revocation of several acts done by her before the marriage. The general rule is, that all acts shall be revoked, or extinguished, when it is for the benefit of both; but when it will manifestly be to their prejudice, her acts will not be void. Thus if she make a lease at will, when sole, or be lessee at will, the marriage will not determine the lease, nor can she in either case determine the lease without the consent of the husband.

b If a single woman enter into a submission to arbitration, her subsequent marriage will be a revocation. If a single woman and another person join in a submission with a third person, her marriage will revoke the submission, as it respects the whole without notice, and if an award be published after such marriage, it will not be binding, even on the person, who submitted jointly with the single woman.

c All contracts and debts between husband and wife, that were made before marriage, that were to take place presently, or might happen during the marriage, are extinguished by the marriage. A man executes a bond to his intended wife, to leave her a certain sum at his death: the bond is void, but equity will decree payment, on the idea, that it is in the nature of a promise or covenant, to leave the wife a certain sum at his death: such promises and covenants not being extinguished by the marriage, as they are to be paid in future, and are not a present debt. If the husband enter into a bond with a stranger, conditioned to leave the wife a certain sum, it will be good.

IV. Of the power which marriage gives the husband over the estate of the wife.

d As the law contemplates the husband and wife as being but one person, it allows them to have but one will, which is placed in the husband, as the fittest and ablest to provide for and govern the family; for this reason it gives him an absolute power over her personal property; but he does not become the absolute proprietor of her real estate. He has the power to use and improve it, and take all the profits of it during her life. He may lease it during life, but cannot make an absolute sale of it, without her consent, as she

continues

a 1. Bacon's Abridgment, 291. 5 Coke, 10. *b* Roll. Abr. 331.
c 1 Bac. Abr. 291, 292. *d* Ibid. 1. 286.

continues to be the proprietor in fee. In the first settlement of this country, the husband was considered as possessing the power of alienating the lands of his wife, without her knowledge or consent, upon the principle, that by force of the marriage, he became the absolute proprietor of all the lands she owned, at the time of the marriage, or that descended and came to her during that time. This custom originated from the consideration of the little value of lands at that early period. But a statute has been made providing, that the husband shall not alien by deed any estate of inheritance that comes to the wife, before, or during the coverture, unless her consent to such deed be expressed by her hand and seal to the deed, and acknowledged before some assistant or justice of the peace. *f* If a man marries a woman seized of an estate in fee, he gains a freehold in her right. *g* The husband, by virtue of the marriage, becomes the compleat proprietor of the chattels real of the wife, and may dispose of them as he pleases. Thus if a woman be possessed of a term for years, of ever so great extent, and marries, the husband becomes the proprietor of the whole term, and he may dispose of the whole or part, and it is liable to be extended for his debts: but if he dies without disposing of it, then it survives to the wife. He cannot devise such term by will, for that does not operate till after his decease, and of course is no disposition in his life; and then instantly at his decease the term by operation of law reverts to, and reverts in the wife. The husband may however execute a lease to take effect at his death, which shall conclude the wife.

b All personal estate belonging to the wife, and in her possession, at the time of the marriage, is instantly, and absolutely vested in the husband, and becomes his property. He may use, and dispose of it without her consent, and may give it away by will. In case he never disposes of it in his life time, it shall at his death go to his heirs, and not to his wife, tho she survive him. A bare possession of personal goods will not by marriage, vest them in the husband. If goods are bailed to a single woman, or she finds them, and marries, action must be brought against the husband and wife. Where the goods of a single woman are in the possession of another by trover, or bailment, and she marries, the property which continued in

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e Statutes 120. *f* Coke Lit. 351. *g* Co. Lit. 46. 351. *b* Ibid. 351.
i Sid. 172. Hub. 641. Moore, 25. Vent. 261. 2 Lev. 107.

the wife, is vested in the husband ; and he alone, without his wife, may bring an action for them. ^k But things in action, where she has a right of action to recover them, as debts, are not absolutely vested in him : but he has right to sue for and collect the debts, and reduce them into possession, which gives him an absolute property in them : but if he fail to collect them in her life time, or to reduce the property to possession, then on her decease, such things in action shall go to her heirs, and he shall have no right only as administrator to her, but if she survive, then the same remains in her. If the husband sue an obligation, and obtain judgment and execution, and the wife dies, this is such an alteration of the debt as to reduce it in legal consideration into possession, and the husband may collect the execution, and shall have the money. For wherever the husband makes any alteration in the state of the debt, so as to exercise an act of ownership respecting it, the law deems it to be a reducing to possession. ^l So if the husband make a letter of attorney to a person to receive the money, on obligation due to the wife before marriage, who receives it, and the wife dies, the husband shall be entitled to the money, for by the receipt this was become a thing in possession. ^m The husband has the same right to the estate of the wife accruing to her during the marriage, as to that which she possessed at the time of the marriage.

V. How far the husband is chargeable with the debts of the wife, contracted before and after marriage, and of a wife who is executrix or administratrix.

The husband is bound to pay the debts of the wife contracted before marriage, whether he received any estate by her, or not ; for as her existence is consolidated into his, and he has the use and profits of her real estate during marriage and the absolute property of her personal estate, with the advantages of her labour, it is reasonable that he should pay her debts—for otherwise they must be wholly lost, which would be an injustice to her creditors, that the law will not authorise persons to accomplish by their own act. ⁿ But the debts must be collected in the life time of the wife, and if she dies, the husband is exonerated from the liability to pay them, unless a suit has been commenced, and judgment obtained

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^k Co. Lit. 351. / Roll. Abr. 342. ^m Co. Lit. 351. Roll. Abr. 352.
ⁿ Ibid. 351. Sid. 337.

and the wife die before execution be issued, or after it be issued, and before collection, then the husband is liable to pay, because the judgment has altered the debt. If the wife survive the husband, she is personally liable for all debts contracted before the marriage, which were not collected of the husband in his lifetime, or altered by a judgment against the husband and herself.

• In respect of debts contracted during marriage, it is a general rule, that the husband shall provide for the wife, all necessaries suitable to his degree, estate, or circumstances : but that she has no inherent power to bind the husband for any contract, not even for necessaries, without his assent precedent, concomitant, or subsequent, express or implied. The evidence of assent must be left to the jury to determine, and tho no express consent, or agreement be proved, yet if it appears that she cohabited with her husband, and bought necessaries for herself, children, or family, this shall be deemed sufficient evidence of an implied assent, and the husband shall be chargeable. If the wife cohabits with her husband, let her be ever so lewd, he is liable to pay for necessaries, for he took her for better or worse. If he runs away from her or turns her away, or forces her by ill usage and cruelty, to leave him, he gives her credit wherever she goes and must pay her contracts for necessaries. If a man be beyond sea, on a voyage, and the wife contracts for necessaries, this shall be good evidence of a promise to bind the husband. In these cases, the law goes upon the principle of presumptive proof of consent, which shall be sufficient, unless contradicted by positive proof. If the husband allows the wife a separate maintenance, or prohibits particular persons from trusting her, he shall not be liable for her contracts, while he pays such separate maintenance, nor to the persons particularly prohibited, for in these cases, no consent, but the contrary appears : but a general warning in the gazette, or newspaper, not to trust her, will not be a sufficient prohibition. *p* But where a husband turns or forces away his wife, he is liable for her contracts for necessaries, and cannot make a particular prohibition to any person not to trust her, so as to exonerate himself from liability. *q* If a woman elopes from her husband, tho she does not go away with an adulterer, or live in an adulterous manner, every person trusts her

• 1 Bac. Abr. 295. *p* 2 Strange 1214. *q* Ibid. 875.

her at his peril and the husband is not liable for her contracts for necessaries. * If a woman elope from her husband, with an adulterer, or lives from her husband, in adultery, he is not liable for her contracts for necessaries. If a woman departs from her husband without his consent, and during her absence, he prohibits sundry persons and particular J. S. to trust her, and afterwards she makes a request to cohabit with him again, and he refuses to receive her, and yet J. S. sells her necessaries suitable to the degree of her husband, yet he shall not be charged : and here this distinction is made, that where the husband forces away the wife, he can make no particular prohibition ; but where the wife elopes, even tho she offers to return, yet as she was guilty of the first wrong in eloping, the husband does not lose his right to make a particular prohibition.

/ A married woman that elopes from her husband, cannot be sued alone and separate from her husband, for any contract whatever ; and the only instances where a married woman can be sued alone are, where the husband has abjured the realm, or is exiled, or the like, so as to be deemed politically dead. So that if a person trusts a woman, that has eloped from her husband, he has no possible remedy for the recovery of the debt ; and the reason of the law is to prevent women from eloping, by preventing their obtaining credit even for necessaries.

When a man marries a woman that is an executrix, or administratrix, he becomes jointly concerned with her, and they must join in all matters that respect the settlement of the estate. † The husband acquires no property in the estate, the wife holds by such right, but is equally accountable with her, as tho he had been executor or administrator himself. " If the wife before her marriage shall have committed a waste, in the estate that come to her hands in such capacity, it shall be deemed a devastavit in the husband.

VI. When the husband and wife must join in suing, and be joined in being sued, and when the wife may sue, or be sued as a single woman.

* 1. Strang. 647. 706.
" Cro. Car. 603. Roll. Abr. 347

/ 2 Black. Rep. 1079.

† Co. Lit. 354.

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1. ^{to} It is a general rule, that in all cases where the debt or cause of action will survive to the wife, the husband and wife must join in the action, as in recovering debts due to the wife, before the marriage, in an action relating to her freehold, or estate of inheritance, or for injuries done to her person. If a bond be executed to the wife during the marriage, conditioned to pay money to the wife, the husband alone may bring an action. * Upon an express promise to pay the wife a certain sum, she may join with the husband in the action, because it will survive, as in the case of a promise to pay the wife ten pounds, on the consideration of curing a certain wound, which was to be effected by the skill and labour of the wife : but unless there be an express promise to the wife, she cannot join, for the fruit and labour of the wife, belong to the husband ; for which he only shall bring the action. Upon trover before, and conversion after marriage, of the estate of the wife, they must join in the action. ^y For all injuries done to the person of the wife, as battery, false imprisonment, slander, and malicious prosecution, the husband and wife must join in the action, for the recovery of damages, and if she dies, the action dies with her. = But for an injury done to both, as a malicious prosecution, they cannot join. The husband must bring action alone for his injury, and join the wife in an action for the injury done to her.

Where the husband for any personal tort done to the wife, sustains special damage, he may have his action alone, as in the case of a battery, carrying away, detaining, or falsely imprisoning the wife, by which he loses her comfort and company, and her service and assistance in his family. For this injury he is entitled to his action. Where the wife was administratrix or executrix, the husband must join, and they must be named as executors or administrators.

2. = The husband is by law, responsible for all the actions for which his wife was liable, at the time of his marriage, and for all her torts and trespasses during the marriage, and the actions in such cases, must be brought jointly against them, for if she might be sued alone, it would be a method of subjecting the property of the husband without giving him an opportunity of defending himself.

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^{to} 2 Lev. 493. 1 Bac. Abr. 305. * Sid. 172. ^y Roll. Rep. 360.
 2 Monro & wife, vs. Maples &c. S. C. 1794. a Co. Lit. 133.

If therefore, a man recovers against a married woman, as sole, the husband may avoid it, by writ of error. *b* If goods come to a married woman by finding, the action must be brought against the husband and wife, and the conversion laid in the husband, because she cannot convert to her own use—but as both were concerned in the trespass of taking them, the action must be brought against both. *c* If a lease for life, or years, be made to husband and wife, reserving rent, action of debt for rent may be brought against both, for this is for the advantage of the wife: *d* but assumpsit lies not against husband and wife, for a promise made by them during marriage, for as to the wife, it is void.

2. *e* By the common law of England, when a man has abjured the realm, is banished, *f* or transported, he is deemed to be dead in a civil point of view, and being disabled to sue in right of his wife, she is considered as a single woman, for it would be unreasonable that she would be without remedy, or that persons who have claims upon her, because they can have no redress against the husband, shall have none against her. *g* If a woman marries an alien enemy and he resides in a foreign country, she may be sued as a single woman.

h By a particular custom of the city of London, if a married woman carry on a trade, in which her husband does not intermeddle, she may be sued as a single woman. *i* In Equity, the separate estate of a married woman, living as a single woman on a separate maintenance allowed by the husband, on a separation after marriage, has been subjected to the payment of her contracts: but the general principle of law has been, that a married woman can have no legal property, and has lost all ability to contract, yet in England, since the practice of married women living absent from their husbands on separate maintenance, has become so frequent, Lord Mansfield, on the principle of extending remedies to correspond with the alterations of manners, and to furnish relief at law, as far as possible in all cases where equity relieves, has decided that a contract is binding upon a married woman, living separate from her husband, by agreement, having a large separate maintenance settled upon her, continuing notoriously to live as a single woman, and contracting

b Co. Lit. 153. Roll. Abr. 6. *c* Ibid. 348. *d* Palm. 313. *e* Co. Lit. 133. *f* 1. Bac. Abr. 318. *g* Salk. 116. *h* 10 Mod. 6. *i* Pow. on Cons. 71.

and getting credit as such, the husband not being liable; and that she may be sued as a single woman. Powell in his essay on contracts, strongly reprobates this decision. He contends that this principle gives the married woman the moral capacity of contracting in all respects, the same as if she were a single woman, that it militates against the first principles of the English law; and that it is blending law and equity, which tho aiming at the same end, which is justice, are distinctly administered in their respective courts, by their particular judges and rules of justice. Yet it may be said, that when the law recognized the idea of a separate estate of the wife, and a separate living from the husband, it necessarily involved the idea of a power of contracting, and being sued as a single woman.

But in this state our courts have had no occasion to take these principles into consideration, for we have not introduced the practice of separate maintenance, and living of the husband and wife. Nor is it very probable that we ever shall, as the granting of divorces, renders such separations unnecessary: and this may be considered as a strong argument in favour of the policy of our law, for these separations necessarily arise from the indissoluble nature of the marriage contract, by the English law.

VII. Of the power of the husband over the person of the wife, and her remedy for any injury done her by him.

The husband has power and dominion over the wife, as he is responsible for her actions; he may controul, restrain, and regulate her conduct, and keep her by force within the bounds of duty, and under due subordination and subjection. * When the wife makes an undue use of her liberty, by squandering the estate of her husband, or going into lewd company, the husband may lay her under a restraint to preserve his honor and estate—but if he restrain her of her liberty unreasonably, or imprison her, she may have relief by habeas corpus. † It is an old principle of the common law, that the husband has the power of moderately chastising the wife for her misbehaviour, but that this power must be confined within reasonable bounds, and he is prohibited from using violence, for if he threatens to beat her outrageously, or uses her

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† 1 Bac. Abr. 1. 255.

* 1 Strange, 478.

† 1 Black. Com. 447.

outrageously, she may swear the peace against him, and he shall be required to find sureties for his good behaviour.

The practice was undoubtedly introduced in an unpolished age of society, and it is with regret that I mention it as a part of the common law, that the husband possesses the barbarous power of chastising the wife : for the peace, the security, and the happiness of domestic life, are much more dependent on the morals and the virtues of the people, than political regulations. Where refinement and purity of manners prevail, and the sentiments of the people are not corrupted and depraved by a licentious and unrestrained intercourse of the sexes, we may expect that tenderness and delicacy of sensibility which alone can produce permanent happiness in the conjugal state : but when recourse is had even to moderate chastisement, to preserve the balance of power, an everlasting farewell may be bid to all prospects of pleasure and felicity.

In this state, I have never known the question agitated with respect to the power of the husband, to chastise his wife. If such a question should ever be brought before a court, I hope they will discard the savage doctrine of the common law, and decide that a husband is punishable for the unmanly act of chastising his wife.

VIII. How far the acts of the husband, or wife alone, or jointly with the wife, will bind the wife.

" The husband has an absolute power of disposing of the chattels real, and personal estate of the wife : but of her lands he can only dispose of the use and improvement during his life, without her consent. She may join in conveying or leasing them, and the contract will be valid. " If the husband lease the lands of the wife for a longer term than his life, and she survive, the lease will be good, unless she express her dissent, by some act after the death of her husband, for if she accepts rent upon the lease, or does any act which amounts to a consent to the lease, it will be binding upon her.

" A married woman is capable of purchasing, for as this can be no disadvantage to the husband, he is supposed to assent to it ; but he may disagree and avoid the purchase. If he neither a-

" Rol. Abr. 246, 347.

" Co. Lit. 45.

" Ibid. 3.

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greets, or disagrees expressly, the law implies from such conduct, an agreement. But in case of an agreement, the wife may after his death, wave it, for having no will at the time of the contract, she is not absolutely bound by it : and if she does not after the death of the husband by some act express her agreement to the purchase, her heirs may depart from it.

IX. Of the crimes of the wife, where she alone shall be punished, and where the husband shall be responsible for what she does in a civil action.

A married woman, may be punished for any crime she commits, in the same manner as if she were single. If it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be proceeded against without him, by way of indictment, or information ; for the marriage does not protect the woman in criminal cases ; nor render it necessary to join an innocent husband in the prosecution. *p* The law so far favours the wife on account of her subjection to her husband, that if she commits a theft in company with or by the coercion of her husband, she shall not be punished, *q* and she shall not be deemed an accessory to a crime, for receiving her husband who has been guilty, tho the husband shall be, for receiving the wife. *r* She cannot be guilty of theft, in stealing the goods of her husband, from the legal consideration, that they are one person—nor can a stranger be guilty of theft in receiving the goods of the husband by the delivery of the wife. *s* But if she commit a theft of her own volition, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with or by the coercion of her husband, she is punishable as if she were single, because her obligation in such cases to obey the law, is of a higher nature, than the obligation to obey her husband. *t* The husband is not liable to pay any forfeiture, recovered on any public prosecution—but if the wife incur the forfeiture of a penal statute, the husband may be made a party to an action, or information for the same, as he may generally for any suit, or cause of action given by the wife, and shall be liable to answer for the damages recovered therein.

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p Hal. p. c. 65. Hawk. p. c. 2. *q* 3 Ins. 108. Hal. p. c. 65. *2* Hawk. 320. *r* Hawk. p. c. 93. *s* Hal. p. c. 65. Hawk. p. c. 18. *t* Sid. 375. Lev. 247.

OF PARENT AND CHILD.

CHILDREN are of two kinds, legitimate and illegitimate, or spurious. Legitimate are those which are born within the pale of matrimony. The law is so indulgent to the frailties of humanity, that children shall not be deemed illegitimate, if the parents will marry at any time before their birth, and therefore their being begotten out of lawful wedlock, is not the criterion, by which illegitimacy is determined, but the intermarriage of the parents subsequent to the birth of a child, will not render such child legitimate.

Illegitimate children, commonly called bastards, are such as are born as well as begotten out the state of lawful wedlock. I shall treat of each kind of children, and,

I. Of the reciprocal rights and duties, subsisting between parents and children, who are legitimate.—The duties of parents consist in affording their children maintenance, protection and education. These duties are all founded in nature, and result from that ardent affection towards their offspring, which is implanted in the bosom of parents. The duty of maintenance, consists in making provision of necessaries for the support of children, and is incumbent on all parents who possess a sufficiency of estate, during the infancy or nonage of their children. Parents are not bound to provide for their children after they become of full age, in case they are able to provide for themselves, but if they are not, then the statute has pointed out their duty, ^a which enacts, that when it shall happen, that any person, or persons, shall be naturally wanting of understanding, so as to be incapable to provide for themselves, or by the providence of God, shall fall into distraction, and become non compos mentis, or shall by age, sickness, or otherwise become poor and impotent, and unable to provide for themselves, and have no estate, with which they can be supported and maintained, then they shall be taken care of and supported by such relations as stand in the line or degree of father and mother, grandfather and grand-mother, children and grand-children, if they are

^a Statutes.

are of sufficient ability, which is to be done by order of the county court, where such persons are, upon application of the selectmen of the town, or any one or more of such relations.

The duty of protection, is founded in the nature of the connexion between parent and child, and is enforced by the strongest principles. The parent is the natural guardian of the child and may aid, assist, and uphold him in law suits, without being guilty of maintenance, he may justify an assault and battery, in defence of his children, and so indulgent has the law been to parental affection, that where a man's son was beaten by another boy, and the father to revenge the quarrel of the son, went near a mile and beat the other boy so much that he died, this was called manslaughter only, and not murder.

The duty of parents to furnish their children with proper education is left by our law, very much to their own consciences.— Education is undoubtedly an object of the highest consequence to civil society, but it is better generally to leave it to the natural bent of the human mind, for all political regulations will tend to limit and shackle the exertions of genius, and prevent that gradual improvement to which the intellectual faculties are always progressing. The legislature therefore have left the higher branches of education to the discretion of the people, and have only made provision for a sufficient degree of learning to prevent their sinking into barbarity, and to lay the foundation for more important improvements. The law requires, that all parents and masters of children, shall by themselves or others, teach and instruct all children under their care and government, according to their ability, to read the English tongue well, and to know the law against capital offences, and if unable to do this, to learn them the first principles of religion.

It is the duty of all parents and masters, to employ their children and apprentices in labour, so as to prevent their living in idleness, and all children are to be brought up in some honest and lawful calling, and employment.

The power of parents over their children, is calculated to enable

able them to perform their duty and keep their children in obedience and subjection. The parent may restrain and controul the actions of his children, and may correct and chastise them while under age, in a reasonable and moderate manner. The consent of parents must be obtained by minors to their marriage. The father has no power over the estate of the child, only as guardian and trustee. He may receive the profits, during the minority of the child, but must account for them when he arrives of full age. The parent is entitled to the benefit of the labour of the child during minority. The period when children arrive to full age, are capable of acting for themselves, and are liberated from the government of their parents, is at the age of twenty-one years, being the same, both for males and females.

The duties of children to parents, are obedience and subjection during their minority, and honor, reverence, and respect during their lives. As they depended on the assistance and protection of their parents, during the feeble and defenceless period of infancy, so when their parents are reduced to a state of infirmity, by old age, it becomes the duty of children to yield the same assistance and protection. The statute law has therefore imposed upon children the same obligation to support their parents when reduced to want, as upon parents to support their children, under like circumstances; but sons by marriage are not liable to contribute to the support of the parents of their wives.

^w By the Roman law, parents had much greater power over their children, than by our law. By a law in the twelve tables, fathers had the power of life and death over their children, and might sell them. This law however was moderated in the progress of improvement: but still the parental power was very extensive. ^x The children could acquire no property only for the benefit of their parents, and they were liberated from paternal government only by the death of their parents. The paternal authority, extended even to grand-children, and a system of domestic despotism seems to have been established by law, repugnant to the happiness and destructive of the rights of mankind.

II. Of illegitimate children, or bastards, and we shall con-

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^w Justinian's Institutes, l. i. tit. 9. ^x Cod. 8. tit. 47.

sider, 1. Who are bastards. It has already been remarked, that bastards are children, begotten and born out of lawful wedlock. *y* By our law, the intermarriage of the parents will not render the issue previously born legitimate: but by the Roman and canon law, such subsequent marriage would legitimate the issue previously born. *z* All children born so long after the death of the husband, that by the ordinary course of nature, they could not have been begotten by him are bastards. But as this is a matter of some uncertainty, as various accidents may retard, or accelerate the birth, the law has not exactly ascertained the time. The usual time of gestation, is allowed to be nine solar months and ten days: but a child that was born nine months and twenty days after the death of the husband, was allowed to be legitimate. A child born eleven months after the death of the husband, and it being proved that he was incapable of enjoying her within a month before his death, was adjudged a bastard. *a* A lewd woman after her husband's death, married her adulterer, and within six months and one day, after her husband's death had a child. It was adjudged to belong to the first husband, because he had the dominion of the woman, at the time of the conception. *b* A wife married immediately after the death of her husband, and had a child within nine months and eleven days after the death of her first husband. It was adjudged to belong to the second husband, because born one day after the usual time, which is the only measure to discern between them. *c* But if the child be born at the end of the nine months and ten days, so as to render it doubtful to which husband it belongs, it is said, that the child may chuse his father, when arrived to the years of discretion. To prevent this dispute, the Roman law ordained, that no widow should marry within ten months after the death of her husband, and by a law in England, before the conquest, if a widow married within ten months after the death of her husband, she forfeited her dower.

d By the common law of England, when a man dies leaving no children, and the wife says she is with child, the heir at law may have a writ to inspect her, for the purpose of preventing her from imposing upon him, by a supposititious heir to the estate.

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y 1 Black. Com. 456. *z* Rol. Abr. 356. *a* Palm. 9. *b* Rol. Abr. 347. *c* Ca. Lit. 8. *d* Ibid.

The sheriff is to impanel a jury of matrons, and if on inspection, they return that she is pregnant, then she is to be kept under proper restraint, till delivered. But in this state there has hitherto been no occasion to adopt this law.

Bastards may be begotten, and born during lawful marriage. If the husband be under the age of fourteen, or incapable by reason of some corporal imbecility to beget children, the issue of the wife are bastards. It is a general rule, that all children born in lawful wedlock, shall be deemed legitimate, and the access of the husband, is to be presumed in favour of legitimacy : *f* but in all cases where it can be proved, that the husband had no access, the children are bastards—It is immaterial whether the husband be within or without the empire, but the proof must be clear, otherwise access will be presumed.

2. We consider how bastard children are to be maintained.—The only duty which the law enjoins on parents towards their illegitimate offspring, is that of maintenance. The father of a bastard child, possesses over him no power and authority, and the child is bound to yield him no obedience. On this account, a statute has been made, pointing out the mode of ascertaining the reputed fathers of bastards and the mode of their maintenance. *g* The statute concerning bastards and bastardy, enacts, that he who is accused by any woman, to be the father of a bastard child begotten of her body, she continuing constant in such accusation, (being examined on oath, and put to the discovery of the truth in the time of her travail,) shall be adjudged the reputed father of such child, notwithstanding his denial thereof, and shall stand charged with the maintenance thereof, with the assistance of the mother, as the county court in which such child is born, shall order, and give security to perform such order, and also to save the town or place where such child is born, free from charge for its maintenance : and the said court may commit to prison such reputed father, until he find sureties for the same. Unless the proofs, evidences, and pleas, made and produced on the part and behalf of the man accused as aforesaid, and other circumstances be such, as the court who have cognizance of the same, shall see reason to judge him innocent and

and acquit him thereof, in which case, they shall and may otherwise dispose of the same.

And every assistant or justice of the peace, (upon his discretion,) may bind to the county court, him that is charged with the begetting of such bastard child, and if the woman be not then delivered, the said county court may order the continuance, or renewal of his bond, that he may be forthcoming when such child is born.

This statute, by admitting the oath of the woman to prove the father of a bastard child, introduces a new mode of proof, which is repugnant to the general rule respecting evidence; and tho attended with inconveniences, is justifiable from the nature and necessity of the case. It is for the interest of the community, that some method be adopted to ascertain the father of such children, for the purpose of compelling him to furnish maintenance, and to relieve the towns where they are born, from such burden. From the nature of the thing, it is impossible for any person to know the father of a bastard child, but the mother, and unless she be admitted as a legal witness, the father could never be discovered, all bastards would become a public expense, and this would operate as an additional inducement to a practice to which mankind are now impelled, by a propensity that deserves to be checked and not to be strengthened. On this principle then, the statute has introduced the best mode of proof which the nature of the case will admit. The testimony of the woman extends no further than to establish the fact, that the person accused, is the reputed father of the child, so that he becomes chargeable with its maintenance. In legal consideration, it fixes on him no crime, and exposes him to no punishment. But as this mode of proof, gives great advantage to a woman, and seems to be a hardship on persons accused, the law has guarded it in the most effectual manner possible. The woman must be constant in her accusation, and uniform in her story. If she accuses different persons at different times, no credit is to be paid to her testimony. She must be put to the discovery in the time of her travail. At that critical period of danger and distress, it is supposed that few women possess firmness and wickedness enough to accuse a man falsely. The statute therefore, has made this

measure absolutely necessary, to enable a woman to support this charge against the man she accuses. The omission of this requisite, can be supplied by no other proof; for where a person intends to take benefit of a statute, he must comply with every requisite of it. The oath of the woman accompanied with a compliance with the law, is what is called statute proof, and has so generally been considered as sufficient evidence to convict a person accused, that the certainty of conviction when a person is accused, has become a proverbial expression. It is unquestionably true, that the oath of a woman must prevail against the denial of the person accused, and that it devolves on him the burden of manifesting his innocence. The true point of light, in which we are to consider this matter is, to allow the oath of the woman, to be admissible and legal evidence, and then to give the man accused the privilege of counter-acting, invalidating, and destroying her testimony, in the same manner as is permitted in other cases. This is clearly warranted by the statute, which authorises the court to acquit a man, when he exhibits proof sufficient to satisfy them of his innocence.

The testimony of the woman, ought to be corroborated by those circumstances which usually attend such transactions, and which are the best guide to truth. If she stand single in her story, unsupported by such collateral circumstances, she is to be distrusted. If the man accused can shew it to be impossible that he is the father of the child, by proving that he was in some other place at the time she accuses him of the fact, or that by some corporal imbecility, he was incapable of procreation, he must be acquitted. Indeed it may be laid down as a general rule, that if the man accused bring proof of such circumstances, as satisfy the court of his innocence, such as a criminal connexion with another man, they may acquit him. Merely the proof of a want of veracity and chastity, may not be sufficient, but those combined with other circumstances, are to be taken into consideration. For it is much to be suspected that a woman of notorious lewdness and wickedness, will accuse an innocent person, for the purpose of screening the guilty, or to gratify malice and revenge.

The statute requires an examination of the woman on oath, but
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this may be before or after the birth of the child. It is the usual practice for a woman, when she discovers herself pregnant with a bastard child, to make complaint to a justice of the peace, who issues his warrant, and the person accused is brought before him for the purpose of holding an enquiry. Such single minister of justice may at discretion bind such person to appear at the next county court, and for the purpose of exercising his discretion, some enquiry must be had—but the authority is bound in duty to recognize the person to the county court, unless the prosecution appear to be wholly groundless, and without any colour of probability. But a prosecution may be commenced by the woman after the birth of the child, in case she conformed to the statute as to accusation at the time of delivery. Within what time however, after the birth of the child, the prosecution shall be commenced, or be foreclosed, has not been determined.

It is provided by the statute, that where the woman omits to bring forward a suit, to recover maintenance, and no sufficient security is offered to save the town from expence, for the support of bastard children; the selectmen may institute a suit in behalf of the town, to recover maintenance of the person accused: and may take up and pursue a suit began by the mother of the child for maintenance thereof, in case she fail to prosecute to final judgment. ^b If a woman has a bastard child, and marries before a recovery is had, her husband cannot join with her in a prosecution for the maintenance, because he is not compellable by law to support such child. ^c But where in such case, the woman being dead, the county court admitted her deposition, taken before any process was commenced, and also the justice before whom she had sworn the child, to testify what she then said, judgment was reversed by the superior court, because such evidence was not admissible. ^d But the deposition of the woman in a prosecution in her name, where she was unable to attend the court in person, by reason of sickness the same being legally taken, has been admitted and considered as sufficient evidence for a conviction.

In England there is a process to compel a woman to filiate a bastard child, that is, to make known the father; but we have

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^b Baldwin and wife, vs. Cheseborough, Sup. C. 1790.

^c M'Donald vs.

Hobby &c. S. C. 1790. ^d Whitney, vs. Putnam.

no such process, and the mother cannot be compelled to discover the man, with whom she has been criminally connected. This defect of our law, has however in some measure been supplied by the practice of some midwives—who in cases, where a private settlement had been made, and the women were anxious to conceal the name of the person, have refused to yield them any assistance until they discovered the names of their paramours. But the law will not authorise a midwife to refuse her assistance to a woman in travail, for the purpose of compelling her to disclose a secret: and when a midwife is employed and refuses assistance, for such purpose, action would lie against her for such a neglect of duty and violation of humanity.

3. The only legal disability to which a bastard is subjected, is that he is incapable of inheriting, being sometimes called the son of nobody, and sometimes the son of the people. This is the only disability, which a bastard, upon the principles of reason and justice can be made to suffer, because he cannot be responsible and ought not to be punished for the crimes of his parents. But as he cannot come within the legal description of an heir, on account of the uncertainty of his father, he must be excluded from this privilege. A bastard is capable of gaining a name by reputation.

CHAPTER SEVENTH.

OF GUARDIAN AND WARD.

THE father is considered as the natural guardian to his children, and during their minority has the care of such estate as they may have, and is accountable for the profits to the children, when they arrive to full age, but the common understanding of guardian, is where the father is dead, and the guardian is substituted in his stead and succeeds to all the powers and duties of the parent. In the investigation of this subject, I shall consider, 1. The ages of minors and wards, for different purposes. 2. The appointment of guardians. 3. Their power and duty. 4. The capacity of minors to contract. 5. Their liability for acts done by them. 6. The mode in which they must sue and be sued.

1. Persons

1. Persons within the age of twenty-one, are, in the language of the law denominated infants, but in common speech, minors.—Those who are under the government of guardians, are called wards. / By statute, males at the age of fourteen and females at the age of twelve, are capable to chuse guardians, ^m and by common law may consent or disagree to marriage, being then arrived at years of maturity or discretion, which is called the age of puberty. By the statute law, at seventeen years of age, both sexes are under a capacity to dispose of their personal estate by will. By common law, at the same age, a male may be an executor, and a female an executrix. By the statute law, at twenty-one, they become of full age, are liberated from parental power and become free, which is compleated on the day proceeding the birth-day. ⁿ By the Roman law, persons having no fathers, are under the control of tutors till they are fourteen, and curators till they are twenty-five : which is the age in all cases, when they are of full age, so, as to be capable of contracting.

2. • Guardians are appointed by the courts of probate, to minors under the age of fourteen. Minors of the age of fourteen have a right to chuse their guardians, who are to be allowed by the courts of probate. When there are minors of age to chuse guardians, who have neither parents, guardians, or masters, the judges of courts of probate, in whose district they live or reside, must notify them to appear, and elect guardians, which such courts may allow of—In case of neglect or refusal, such judges may appoint guardians, with the same powers as if elected by such minors. The judges of probate, on allowing or appointing guardians, must take sufficient security for the faithful discharge of the trust according to law, and render their account to the judge, or the minor, when ~~he~~ arrives at full age, or such other time, as said court of probate upon complaint to them made, shall see cause to appoint.

† It has been adjudged, that where a guardian is appointed to a minor by the court of probate, under the age of chusing one, he is in judgment of law, guardian till the minor arrive at full age, unless the guardian be removed from office, or another be chosen after the minor is of sufficient age, or unless the guardian be appointed with express limitation of time.

3 The

/ Statutes, 3. ^m 1 Black. Com. 463. ⁿ Justinian's Institute. Digest 1 4. tit. 4. ^o Statutes 93, 94. ^p Kirb. 287.

3. The guardian being considered as a substitute for the father, the consequence is, that the power and duty of guardian and ward, in a great measure correspond to that of parent and child. The guardian is intrusted with the care of the person and estate of the minor. He has power to do every act that is necessary for the use and improvement of the estate, and may execute leases of lands.

7 Where one or more joint-tenants, or tenants in common, are minors, the guardians with the assistance of such persons as the courts of probate shall appoint, are empowered to make partition with the other tenants, which shall be conclusive upon the minors, their heirs and assigns. r When a minor is interested in a mortgaged or other real estate, which in equity ought to be conveyed to any other person, the court having cognizance may enjoin the guardian under a suitable penalty, and the guardian is authorized to make a conveyance in behalf of the minor, that shall be effectual in law, and if there be no guardian at the time of bringing the suit, the court may appoint one, with full power.

It is the duty of the guardian to take reasonable and prudent care of the estate of the ward, and to use and improve it in the most advantageous manner. f But he cannot maintain an action in his own name, for any injury done to the land of his ward, such action must be in the name of the ward.

When the ward arrives at full age, the guardian must account for the rents and profits of the estate, and shall be allowed a reasonable compensation for his expense and trouble. He must answer for all damages arising by his misconduct and neglect. Whenever a guardian is appointed, the court of probate take bonds for a faithful discharge of the trust, and if the guardian misbehave, and there be danger that he will injure or waste the estate, the court on complaint, may put the bond in suit at any time, and call the guardian to account, which seems to be the proper mode for minors to call on their guardians to account during their minority: but at common law, a minor may institute a suit against his guardian under such circumstances, by his next friend. When the minor arrives at full age, and the guardian neglects to account, the bond may be put in suit, or an action of account at common law, may be brought.

4 In
 7 Statutes 115. r Ibid. 48, 49. f Eastman, vs. Camp, S. C. 1790.

4. In respect of the capacity of minors to contract, the general rule is, that minors have the power of making contracts for their benefit, which are voidable by their own act; but that they can never make a contract to their disadvantage, that is obligatory upon them, for such contracts are void. ¹ If a minor makes a contract for his benefit, that is by which he acquires something, as a purchase of lands, or any personal property, or where there is a semblance of benefit, he may at full age dissent to the contract and avoid it, or affirm it and render it obligatory: but when he has once made a contract to his benefit, he cannot dissent to it, till he becomes of full age: because this would be an act in the nature of a contract, that operates to his disadvantage. Therefore a minor cannot execute a release, or discharge of a beneficial contract, without receiving an adequate consideration. Thus, if a minor holds a note against a man, and executes to him a discharge, the promissor cannot take advantage of the discharge, but must shew that he has paid the sum due on the note, or he shall be holden. A receipt under the hand of the minor, shall not be evidence of the payment of money on a note or other debt, if the minor denies the reception of it; but the party must make absolute proof of the payment of money to avoid the note; for it is clearly correspondent to reason and justice, that the payment of a debt, or sum of money due by contract to a minor, shall discharge the debt, because the reception of the money, is in the nature of a contract to his benefit, and if the contract be obligatory, an actual performance must be effectual to discharge it.

A minor cannot make a contract to his disadvantage, or without an apparent benefit, or semblance of benefit, that will be obligatory, but the same is absolutely void. He cannot execute a deed of his lands, or transfer his personal property. He cannot obligate himself by simple contract, or specialty. ^u But tho the contract be not binding on the minor, yet it shall be on the person of full age contracting with a minor; for the law respecting the contracts of minors is intended to protect and secure them against fraud and imposition, and is calculated solely for their benefit. ^w Therefore if one deliver goods to a minor upon a contract, knowing him to

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¹ Co. Lit. 2. ^u Show. 171. ^w Sid. 129.

be a minor, he shall not be chargeable in trover, or any other action for them; for the contract being void as to the minor, the delivery shall be considered as a gift to him.

* If a minor gives a note, and when he arrives to full age, acknowledges it to be justly due, and promises to pay it, the note becomes obligatory, and if he pleads infancy in bar, it may be avoided by such special matter.

y But to these general rules, there are some exceptions. The acts of an infant which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding; as if he be an executor, as he may be when seventeen years of age, by statute; all the acts which he does in performance of that trust, are binding.

An act done by an infant, which was right to be done, and which he was compellable by law to do, is obligatory: as if an infant mortgagee, on payment of the money due by the mortgagor, reconvey, the deed is valid, and cannot be avoided: because by law he might have been compelled to have reconveyed. Lord Mansfield says, that this privilege is given to minors as a shield and not as a sword, and that therefore it shall never be turned into an offensive weapon of fraud and injustice.

z By the common law, a minor can bind himself by his contract for necessaries, for diet apparel, education, and lodging. a But the statute law of this state, supercedes the common law, and provides that no person under the care of a parent, guardian or master, shall be capable to make any contract, which in the law shall be accounted valid, unless authorised or allowed so to contract, or bargain, by the parent, guardian, or master, and that in such case, the parent, guardian or master, shall be bound thereby. The action must be brought on the contract directly against the parent, guardian, or master, as tho made by them for their benefit. What shall be deemed an authorising, or allowing to contract, so as to bind the parent, or guardian, is not expressly mentioned. b It has been adjudged by the superior court, that a general licence by the guardian, to the minor to trade, shall render the contracts of the minor

* *Lawrence vs. Gardener*, S. C. 1792. y 3 *Burr.* 1802. z *Powel.* 34.
a *Statutes* 142. *Kirb.* 286. b *Spring vs. Evans* S. C. 1795.

minor obligatory on the guardian. If a minor have neither parent, guardian, or master, he cannot come within the description of the statute, and of course will possess by common law, the power of making contracts for necessaries ; and this seems to be a reasonable construction of the law, for where a minor has no person to provide for him, he must have the power of contracting for the necessities of life, but if he have some person to superintend him, there is no necessity that he should be capable to make any contract for his support.

5. *c* Minors are responsible for all acts that are called torts or trespasses, whenever they are capable to commit them, but not for any acts that are in the nature of contracts. If a minor affirming himself to be of age, borrow a sum of money, and execute his bond for it, he may avoid it by reason of nonage ; and no action lies for the deceit ; for tho responsible for actual torts, as trespasses with force, yet he cannot be for those that sound in deceit ; for if they should, all minors might be ruined : to avoid which they are incapacitated to make contracts, and if they might be sued for a deceit in contracts, they would be exposed to the same danger, as to be liable for their contracts.

d So if a minor on the sale of a horse affirm it to be his own, when it belongs to another, yet on action brought for the deceit, if the minor plead infancy, he shall not be liable : because the contract being voidable, the plea of infancy avoids it, and it is in the nature of an affirmance, by a minor that he is of full age. If a minor goes about town and pretending to be of age, defrauds by taking up goods upon credit, and then pleads nonage, the person injured cannot recover back the goods, or the value, yet he may be punished as a common cheat. *e* Minors are no more liable in equity than at law, for frauds and deceits in contracts.

f Minors on account of their youth and inexperience, are deemed incapable to prosecute and defend in suits. The law therefore to protect them from any injury in this respect, has made it necessary that they sue by guardian, or if they have none, then by the next friend. The parent is called the natural guardian. They cannot be sued only under the protection of, and by joining the guardian,

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parent

c Sid. 258. 3. Bac. Abr. 132.*d* Keb. 778,*e* ~~See~~ Hovey, 3.*f* 1790.*f* Rol. Abr. 287, 288.

parent, or master, in the suit ; if they have none, they may be sued without, but the plaintiff must inform the court, whose duty it will then be to appoint a guardian, for the purpose of assisting them in their defence. *g* If judgment be rendered against a minor, no guardian being cited or appointed by the court, on default, writ of error will lie for the error in fact, and the judgment be reversed.

CHAPTER EIGHTH.

OF MASTER AND SERVANT.

A Servant, is a person subjected to the power and authority of a master for a limited time, upon a particular contract. In discussing this subject, I shall consider, I. Who may be servants, II. The power of masters, and the remedy of servants against their master for injuries, and III. The liability of masters for the acts of their servants,—and of servants for their own acts.

I. Servants are of several descriptions.

1. Menial servants or domestics, who are not however particularly recognized by law, and are so denominated from the nature of their employment. The right of the master to their services in every respect, is grounded on the contract between them. Labourers, or persons hired by the days work, or any longer time, are not by our law, or in common speech considered as servants.

2. Poor debtors may by law be assigned in service, for the payment of their debts, and rendered servants : and for this purpose the law provides, *b* that when a debtor is imprisoned, and no means can be found to pay the debt, except by service, then if the creditor desire it, and the court judge it reasonable, the superior or county court, shall have power to order and dispose of such debtor in service for the purpose aforesaid, to some inhabitant of this state, whether the execution by which he is held, issued from such court or not. Provided, that such court must be satisfied by the oath of the parties, that such debtor has not sufficient estate to pay such

execution,

g Kirb. 116. *b* Statutes, 9, 10.

execution, excepting necessities exempted by law, from execution, and that the debt is really due on good consideration.

The assignment of a debtor in service to pay his debts, is wholly in the discretion of the court. As the restraint of natural liberty, and the subjection of one man to another, is a matter that in many instances, is justifiable, for the purpose of compelling a debtor to discharge his debts: and in some instances may be hard and unjust, it would have been better, had the law more expressly defined the cases in which debtors shall be assigned in service, and not have left it wholly to the discretion of a court.—For where the most valuable rights of man are concerned, we ought to know precisely the tenure by which we hold them, and not depend upon the whim and caprice of a judge, who may doom us to servitude, in cases where we had no reason to expect it. But courts may by a proper train of decisions establish such a construction of this statute, as to make known with certainty, the circumstances under which we may be deprived of our liberty, and reduced to servitude by the judgment of law. In the case of a dishonest debtor, there is the greatest propriety in compelling him to pay his debts by service, for the purpose of punishing him and holding him up as a public example. So where, from the character and rank of a man in life, labour is a proper business, he cannot complain of injustice to be compelled to work to pay his debts. But where a man has lived in affluence, and by some unforeseen misfortune and unexpected accident, is reduced to poverty, it would be cruel to aggravate his wretchedness, by subjecting him to servitude. Between these extremes, there are a great variety of grades in which courts must exercise a discretion tempered with humanity, in designating the proper objects of this law. A debtor cannot be assigned in service, to a man and his assigns.

3. Children may be bound out in service by their parents, till they arrive to the age of twenty-one, which is frequently done by parents, who are unable to provide for their support. So the children of poor persons, supported by the town, that are suffered to live in idleness, the children of parents, that cannot provide for them, and children who have none to take care of them, the selectmen and civil authority may bind out as apprentices or servants, males till the age of twenty-one, and females till eighteen.

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Where parents or masters neglect to bring up children and apprentices in some honest calling, the selectmen and civil authority, may take them away, and bind them to other masters,

4. Apprentices are minors, who are bound by their parents, guardians, or the selectmen, by indentures, to some persons for a term of years, that cannot exceed the age of twenty one, for the purpose of being maintained and instructed by their masters, in the art and mystery which they profess. Our law has limited no time which apprentices shall serve to learn a trade, in consequence of which the community are greatly injured by unskillful mechanics. Perhaps the limitation of service for a time, suitable to learn each trade, might answer a valuable purpose, and furnish the public with good mechanics, without exposing individuals to the inconvenience experienced in England, where the law requiring an apprenticeship of seven years, for every trade, has become a subject of great complaint : because there are many trades which can be easily learned in a much shorter period.

5. Negro or molatto children, born of slaves, after the first day of March, 1784, may be held in servitude till they arrive to the age of twenty-five years, and then they shall be free. This law has laid the foundation of the gradual abolition of slavery, for as the children of slaves are born free, being servants only till twenty-five years of age, the consequence is, that as soon as the slaves now in being shall become extinct, slavery will cease, as the importation of slaves in future is prohibited. The masters of such negro and molatto children, free at twenty-five, have the same power over them as they have over their own : but over their children the masters will have no power. As slavery is gradually abolishing, and will in a short time be extirpated, there being few slaves in this state it will be unnecessary in this place to make any remarks upon a subject that has so warmly engaged the attention of the humane and benevolent part of mankind in the present age. When I treat of the offences of importing slaves and transporting negroes that are free, I shall enter into an historical detail of the progress and termination of slavery, for the purpose of furnishing posterity with all necessary information respecting a practice, which has so long been a dishonor to human nature.

II. Of

II. Of the power of masters, and the remedy of servants for injuries done them by their masters.

A master may reasonably and moderately correct, and chastise his servant for negligence, and misbehaviour. He is entitled to the benefit of his labor and service, and if a servant run away from his master, and be employed by another, the master is entitled to his wages, and can recover them by action. A master may maintain an action against another for beating and maiming his servant: but he must assign the loss of service, as the ground of his action; which must be proved on the trial, or he cannot recover, the servant himself being entitled to an action to recover damages for the battery. A master may justify an assault in defence of the servant, and the servant in defence of his master, on the ground of their reciprocal rights and duties. An action lies in favor of the master against a person for enticing his servant from his service, or for hiring and retaining him in case he knew that he was a servant; but if such person be ignorant of the fact, no action lies, unless he afterwards refuse to restore him, upon information and demand. Where a person takes a servant forcibly from actual service, trespass will lie in favour of the master.

It is provided by statute, that if servants or apprentices above fifteen years of age, withdraw or abscond from the service of their masters, before their covenants or terms of service are expired, they shall serve their masters threefold the time of their absence. When servants or apprentices run away from their masters, it is lawful for the next assistant or justice of the peace, or constable, and two chief inhabitants, in a town, where there is no assistant or justice of the peace, to press men and boats (if occasion be) at the masters request and charge, to pursue such servants and apprentices by sea and land, and to bring them back by force. When children, or servants upon complaint made, are convicted of stubborn and rebellious carriage, against their parents or masters, before any two assistants or justices of the peace, they may be committed to the house of correction, to remain under hard labor, and severe punishment, at the discretion of the court, who on reformation may order their release, and their return to the parents or masters.

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If any servant or apprentice flee from the tyranny and cruelty of his master, to the house of any inhabitant of the same town wherein they belong, they shall be protected, and sustained, till due order be taken for their relief. Due notice must forthwith be given to the master, and to the next assistant or justice of the peace, who shall cause said master and servant, or apprentice, to come before him, and reconcile them if he can; but if he cannot, then he may according to his discretion bind over the master to the next county court, and also the servant or apprentice, or give orders for their safe custody and appearance before said court; which court on hearing the matter, may upon default found in the master, discharge the servant or apprentice from his indenture or service; and if default be found in the servant or apprentice, may inflict a discretionary punishment.

Where the servant or apprentice are too young, or too much overcome by fear, to fly from the cruelty of a master, the law has made no provision for their relief, and the master can only be punished at common law, for a breach of the peace, in chastising unreasonably and immoderately. Perhaps in the improvement of society, it will be discovered that the power of parents and masters, ought further to be restrained and controuled, and that cruelty towards children in those tender years, when they are incapable of defence, shall be punished in such manner as to secure to them mild and humane treatment in all cases. In domestic government nothing can be more prejudicial in forming the manners of youth, than the severity and rigour too often exercised in the corporal punishment of children. A system of education founded upon the principles of a mild government, and generous treatment of children, can alone improve and cherish those virtues, which so essentially contribute to the welfare of the community.

III. Of the liability of masters for the acts of their servants, and of servants for their own acts.

* The master is answerable for every act of the servant done by his command, either expressly given, or implied, / for he who does an act by another, does it in legal consideration by himself. Therefore if a servant commit a trespass by the command

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* 1 Black. Com. 429, 430. / Qui facit per alium, facit per se.

or encouragement of his master, the master shall be deemed guilty of it, as well as the servant, for he is bound to obey only the lawful commands of his master : but a recovery against one will excuse the other, because a man can have but one satisfaction for a trespass. If an innkeeper's servant rob, or steal from, or do any injury to the property of his guest, the master is bound to make restitution : for in all such cases there is necessarily a confidence reposed in the innkeeper, that he will provide faithful servants. This negligence is therefore construed into an implied consent to the injury. * For he who does not prohibit the doing of a thing when it is in his power, consents to and commands it. If the servant, or drawer at a tavern, sells a man bad wine, or bad liquor of any kind, by which his health is injured, action lies against the master ; for the permitting the servant to sell bad liquors, tho without express order to sell to any particular person, implies a general command.

* The master is answerable for whatever he permits the servant to do in the usual course of his business, for this is considered as amounting to a general command. A wife, friend, or relation, that commonly transact business for a man, are for this purpose, his servants, and he is accountable for their conduct. If I pay money to the servant, wife, friend, or relation, in the usual course of business intrusted to them, and they embezzle it, I am not accountable for it ; but if it be not in the usual course of their business, I must answer for it, if they fail to pay it over to the master. For in the first instance, the law implies a confidence, and general command, but in the last no such understanding of the master can be presumed. If I usually deal with a tradesman and constantly pay him ready money, I am not responsible for what my servant takes up on trust : for here is no implied order to the tradesman, to trust my servant ; but if I usually send him on trust, or sometimes on trust, and sometimes with ready money, I am answerable for all he takes up, for it is impossible for the tradesman to distinguish when he comes by my order, or when by his own authority.

• The master is responsible for all the damages that strangers sustain, for any negligence, or misconduct of the servant, while he is actually employed in the business and service of the master. If the

* Nam qui non prohibet cum prohibere possit, jubet.

* 1 Black. Com.

430. • Ibid. 431.

the servant of a smith lames a horse while he is shoeing him, then an action lies against the master and not against the servant. But if the servant be not employed in the service of the master, then he must answer for his own misconduct. A master is chargeable if any of the family lay, or cast any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of the people, for the master has the charge of the household, and must answer for his domestics.

p If a master command his servant to do what is lawful, and he misbehave himself, or do more, the master shall not answer for the servant, but the servant for himself, for that was his own act, otherwise it would be in the power of every servant, to subject his master to what actions and penalties he pleased.

A servant is under an obligation to his master, to perform his duty with diligence and fidelity. He is not therefore accountable for any damage that happens to the master in the course of business intrusted to him, through inevitable accident, but he is accountable for his own negligence and misconduct. A servant or an apprentice may be guilty of theft in taking away the goods of the master, tho under their immediate care : but if a man deliver goods to his servant, to keep or carry for him, and he carries them away with an intent to steal, it is not considered as theft, but a breach of trust, and the servant is responsible for that as well as all other injuries to the property of the master.

CHAPTER NINTH.

OF CORPORATIONS.

CORPORATIONS are instituted to answer certain civil purposes. The mortality of man, rendered it impracticable to invest certain rights in them, for the purpose of preserving that perpetual duration which in some instances, is essentially beneficial to civil society. On this account corporations have been formed and composed of individuals, in whom certain rights, powers and privileges have been invested, and by a constant supply and admission

of new members, the perpetual continuance has been secured, and a legal immortality established. *

Corporations are called aggregate and sole. An aggregate corporation consists in a number of persons united together in one society, and are kept up by a perpetual succession of members, so as to continue forever.

A sole corporation consists of one person only, and his successors, in some particular station, who are incorporated to give them that perpetuity, which as natural persons they could not possess. I know however, of no corporation of this description in this state.

Corporations are divided into civil and ecclesiastical. Civil are instituted, and calculated merely for temporal purposes.—And ecclesiastical, respect the concerns and interest of religion.

This state is one corporation. The counties, towns, and cities, are inferior corporations of a civil nature. The societies are ecclesiastical corporations: private corporations, are Yale-college, the society of physicians, and the banks of Hartford and New-London. In discussing this subject, I shall consider I. How corporations can be created. II. Their power, capacities, and incapacities. And III. How they can be dissolved.

I. Corporations can be created only by act of assembly. This power has been frequently exercised of late years in establishing new counties, towns, and societies. They have incorporated a society of physicians, for the purpose of diffusing medical knowledge, and they have established banks to extend the benefits of commerce. The assembly have the power of creating such corporations as they think proper, and to invest them with such power, and privileges as will correspond with the design of the institution. And such corporations must depend upon the act of creation, for their rule of conduct. Individuals can by no association, agreement, or combination, constitute a corporation. They may form companies or partnerships, under certain names, by which they can make joint contracts, and employ their influence and property, in enlarging the sphere of enterprise and activity: but they can never acquire that legal succession of members and perpetual duration that distinguish corporations.

II. Of the powers, capacities, and incapacities of corporations.

Corporations depend for their special powers upon the act of incorporation, but there are certain incidents that necessarily appertain to corporations from the nature of the institution. They must have a name, by which they are known and called, by which they sue and are sued, and by which they do all legal acts. In consequence of which, they are considered as a collection of individuals combined into a single capacity. They have only an ideal existence, and in contemplation of law. Of course a great variety of corporations may be composed of the same persons, with perfect consistency, all which are capable of suing each other. Thus a town is one corporation, a society within the limits of it, is another, and in a suit between them, the same persons may be plaintiffs and defendants, in different capacities. The privileges of corporations are to have perpetual succession. In all private corporations, of course they have the power of electing new members, as the old ones go off. To sue, or be sued, implead, or be impleaded, grant, or receive by its corporate name, and do all other acts as natural persons may. To purchase lands, and hold them for the benefit of their successors, and to acquire personal estate. To make bye laws, or private statutes, for the government of the corporation, which are binding upon themselves, unless repugnant and foreign to the design of the institution, and contrary to the laws of the land, and then they are void. To have a common seal, but which however is not absolutely necessary. To do all acts, make contracts, or authorise others to make contracts, to execute the purposes for which they were created.

By the common law, corporations must always appear in suits by attorney; the statute law enacts, that towns, trustees for schools, proprietors of common and undivided lands, grants and other estates and interest, and all other lawful societies or communities, may sue and prosecute suits, for the recovery of their rights, in any proper court, and may appear by themselves, agents, or attorneys, and in like manner, defend in all suits. In all such cases it is sufficient notice to the corporation, to leave a copy of the writ or summons with their clerk, selectmen, or committee men, twelve days

days before the sitting of the court, to which the writ is returnable. In consequence of this statute, the practice has been for all corporations to appear, to prosecute and defend by agent. Tho the statute says, that they may appear by themselves, yet this must relate only to such minute corporations, as will admit of the names of all the member to be inserted in the writ ; but where the names are not mentioned, and the suit is brought in the corporate name, it is impossible for the court to know the individuals : in all such cases, the appearance of course must be by agent or attorney. It is usual to insert the name of the agent in the writ.

The only way that a corporation can legally express their minds, or do any act, is by the vote of the majority of the members legally convened, and which must be certified by their clerk, or some person duly authorised for that purpose, under the seal of the corporation, if they have one. There are however certain officers in all corporations, who are vested with certain powers, which they can execute personally : but in the proper business of the corporation, they must meet, and the act must be done by the vote of the members. Thus, if a corporation commence an action, an individual cannot discharge or controul it, but it must be done by act of the corporation, or some person to whom they delegate that power. If a town have a debt against a person, it can be discharged only by an act of the town, and not by an individual of the town.

A corporation can neither maintain nor be made defendant to an action of battery, or such like personal injury, for it can neither beat nor be beaten in its body politic. No action in the nature of an action of trespass, will lie against a corporation, for they cannot in their corporate capacity commit a trespass. If by an act, they direct any of their officers or any other person to do a trespass with force, and if it be done, they may be liable in an action of the case, for the consequential injury : but cannot be deemed trespassers.

A corporation can commit no crime in its corporate capacity, cannot be an executor or administrator, or perform any personal duties, and cannot be committed to prison, for the existence being

ideal, no man can apprehend or arrest it, but the estate of the corporation is liable to be taken on execution for their debts.

.III. We close this subject, with considering the mode of dissolving corporations. It is manifest, that the legislature have the power of dissolving or altering all corporations of a public nature, as counties, towns, and societies, but corporations of a private nature can be dissolved only by the death of all the members, by the surrendry of its franchises into the hands of the assembly, or by a forfeiture of its charter, through negligence or abuse of its powers and privileges. In the last case, the regular mode of proceeding is, to bring an information, in the nature of a quo warranto, to enquire by what warrant, the members now exercise their corporate power having forfeited them by certain acts, which are pointed out in the information. The court must enquire into the facts, and if they are found true, and amount to a forfeiture of the charter, they may declare it void, and the corporation is dissolved.

A SYSTEM

A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

BOOK THIRD. Of Things.

CHAPTER FIRST.

OF THE NATURAL TITLE TO THINGS.

HAVING in the preceding books entered into a minute account of the constitution and government of this state, and the rights and privileges of its citizens, I proceed in the next place to the contemplation of Things, which are the principal objects of all political regulations. It will be amusing to the inquisitive mind to open these enquiries, by a slight view of the origin and foundation of property, and the method by which an exclusive title to it is acquired.

When we observe mankind in the use and improvement of the things of this world, it is manifest that they were created for their benefit and happiness. The original design of the supreme author of nature, has furnished infallible evidence of the common right of man, to the enjoyment of the blessings that are placed within his reach. It is upon this original and natural principle that the right of property is founded. Antecedent to the existence of civil regulations, men possessed all things in common. Every one had the power to convert to his own use, whatever his necessities required. But whenever any person had manifested a design, to appropriate any particular thing to his own use, by taking it to himself, he was entitled

entitled to exclude all others from interrupting him in the enjoyment of it. This is the foundation of the exclusive right of property. While mankind remained in a state of nature, this principle furnished the only rule of conduct. While all things were in common, every one had the right of choice ; but when any person had made his election, no other could justly take from him, what he had taken to himself. This principle is finely exemplified by the comparison of a theatre, which tho' equally open for every person that comes, yet the seat which any individual has chosen and taken, is in a proper and peculiar sense his own ; for the moment any place is filled, nobody has a right to remove the occupier for the purpose of seizing it for himself.

This taking possession of any particular thing that lies in common, and appropriating it to one's own use, has by writer's on natural law, been denominated occupancy, and considered as the natural foundation of the exclusive right of property. Some writers contend that the right of occupancy is founded upon a tacit and implied consent of all mankind, that the first occupant should become the owner ; and others, that the act of occupancy being a degree of bodily labor, is from a principle of natural justice, without any consent, sufficient to gain a title. This fine-spun reasoning upon so plain a subject, is singular and unaccountable. The common right of man to things, all must acknowledge originates from the constitution of nature, without any implied consent, or personal labor. The exclusive right manifestly depends upon the same principles, because it exists prior to and independent of any consideration of consent or labor. A man when in the primeval state of nature, he collected acorns from the trees, or killed the beasts of the forests, to satisfy the cravings of hunger, did not enquire whether all the human race had tacitly acknowledged his right, nor did his personal labor meliorate the things he consumed : but he felt that they were created for his use, and that he had a natural right to make the appropriation. The idea of a common right to things, includes the doctrine, that every person may acquire an exclusive right to a particular thing, by appropriating it to his own use. The necessary consequence is, that the

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electing any particular thing, the taking possession of it, the act of appropriation, create an exclusive title. This is the act of occupancy, and as it is the proper evidence to establish the right, it has by a very common figure been called the right of occupancy.

When the first occupier abandons a thing, which he has taken, it reverts to a common state, and others may take it in their turn. There are many things which perish in the use; but land is capable of a temporary improvement, and we find in the pastoral age of society, that the wandering tribes, which inhabited the earth, took possession of convenient places for the pasturage of their herds and flocks; and when they moved to other places, they were succeeded by other tribes, who occupied the ground in the same manner. While they were in actual possession of a particular spot, they considered themselves as having an exclusive right, and that none had a right to interrupt them in the improvement of it. Their dereliction gave to others a similar right; and such is the title to lands in the pure pastoral age of society. But when mankind in the progressive course of improvement, advanced to the age of agriculture, they discovered the advantage to be derived from a permanent title to the ground, which they cultivated.

" When an individual had bestowed a portion of his labor on a particular spot, and thereby rendered it more productive, than it was in a state of nature, the idea was easily adopted, that his right to that spot did not expire with every temporary dereliction of possession. He was entitled to the produce in the course of the seasons. This led to the division of lands. Then portions were in the first instance distributed among the nations of the earth, and afterwards by a progressive subdivision, assigned to tribes, families, and individuals.

" To effectuate the still further advance of civilization, labour, and industry were necessary: which led to a variety of inventions, by which the gifts of nature were made to contribute in a far greater degree, to the conveniences of life, than they were capable of doing in their primitively uncultivated state. Things derived an accession of value from labour, which they had not in their primitive state, and it was just, that the produce

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“ of each man’s industry should be so far his own, that no other
 “ should share the benefit of it, without his permission. New
 “ ideas of property then necessarily presented themselves to the
 “ mind, whereby every one who possessed himself of things, which
 “ he improved by his labour and industry, was considered as having
 “ thereby acquired a right to retain them as his own, altho they
 “ were not necessary to his immediate use, and by which he ac-
 “ quired the power of disposing of them at his will and pleasure
 “ to others. This laid the foundation on which exclusive property
 “ in moveable goods was established by civil law, of which the cha-
 “ racteristic is, that others are always excluded ; whereas in a
 “ communion of goods in a state of nature, others are not exclu-
 “ ded from things of which any one is possessed, except so long
 “ as they are in the actual use of the present occupier.

It is evident that the power to dispose of property, is one of the essential qualities of ownership, and is founded on the nature of the right. When an individual has brought to a state of cultivation, a spot of ground, or gathered the fruits of the earth, or caught the beasts of the field, he has the power of exchanging them with another, and the person to whom conveyance is made, upon making satisfactory compensation to the original proprietor, succeeds to his right and interest. It is not a mere dereliction by the first occupant, and the possession, or occupancy by a successor that transfers the right. It is the mutual agreement and consent of the contracting parties. This power of disposing of property, originates from the same source as the power of acquiring it, when it lies common to all mankind.

When a man has thus obtained an exclusive right, to particular things, with the power to retain or dispose of them at pleasure, it is to be considered what shall become of them, when death separates him from all his worldly enjoyments and possessions. This involuntary dereliction of property, leaves it to be occupied by some other person, and according to the opinion of some writers, it naturally reverts to its original state, and would be subject to be taken by the first occupant, were it not for the interposition of positive law. But this opinion cannot be well founded ; for when a

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man has acquired an exclusive right to a certain thing, and added to the value of it by his own labour, it is consonant to nature, that he should determine who should enjoy that property which he can enjoy no longer. Every person will have children, relations, or friends, with whom he is connected by the strongest ties of affection and friendship. To promote their welfare, he will be prompted by the most powerful motives that influence the mind, and the idea, that he can appropriate the fruits of his labour, to their happiness, will be the strongest incentive to industry and perseverance in the acquisition of property. The existence of this principle in the human mind, is sufficient to evidence that mankind have by nature, the right of disposing of their estate, in a manner correspondent to their wishes and feelings.

The same principles apply in cases where the owner has not determined, to whom his estate shall descend after his decease. The children and relations of the deceased, have a natural right to the property, relinquished by the death of the owner : for it is presumed, that the deceased owner, would have desired that the fruit of his industry, should be appropriated to the benefit of those with whom he was connected by the ties of consanguinity, and this had naturally led mankind to the adoption of this practice. But the particular relations that should inherit, and the mode of distribution, has been regulated by civil institutions. It is a universal custom among civilized nations, that the proprietor of an estate shall have the power of disposing of it by will, and in case of his dying without a will, that his estate shall descend to his nearest relations. The universality of the custom, is conclusive demonstration, that it is founded in the natural feelings of mankind.

a To all things, which by the nature of them, cannot be reduced to permanent property, mankind acquire a right by occupancy, such are the elements of light, air, and water, in which man can have only a temporary use : also all animals of a wild and untameable disposition. These when taken and in his possession, or when killed, become his property : but when wild and at liberty, they may be taken by any person whatever, of common right, but in all

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things

things, where permanent ownership can be had, the positive law of society steps in, and assigns a certain owner.

By nature we are led to acquire property, and by the same power, we are authorized to dispose of it. But nature does not stop here. By this same principle we are as strongly impelled to unite in society, as we are to acquire property. Should a number of human beings be placed upon an uninhabited island, without laws and government, their first acquisition of property, must be by occupancy, but they would immediately unite in society, and establish laws for the government of the community, and the regulation of property. Nature has pointed the mode of acquiring a title to earthly things, and the power of disposing of them. In the most simple and uncorrupted state of mankind, no particular formality was necessary. A verbal deed and a verbal will were equally authentic and operative with all the solemnity of signing and sealing. But mankind in the progress of society, discovered that such simple modes of conveyance, opened the door to endless frauds and deceits. Hence positive law introduced certain forms and ceremonies, as requisite to constitute a deed or will, for the purpose of preventing imposition in the conveyance of property, and uncertainty, respecting the title. That a deed or will should be in writing, and signed and sealed by the party, is clearly an institution of positive law. That man has the right to dispose of his estate by deed, or will, is clearly the result of natural law.

From these observations, it appears that the laws of nature are the ground work of civil establishment, and that positive institutions were introduced to guard, protect, and defend the natural rights of mankind. These regulations have now superseded the dictates of simple nature, and in the acquisition of property, we pay no regard to them, but are wholly governed by the directions of the positive laws of society. These to counteract the fraud, and wickedness of individuals in different periods, during the progressive improvement of jurisprudence, have now become so numerous and complicated, that great skill and learning are requisite to ascertain the political regulations, that controul, restrain, and govern the conduct of the citizens of the state, every day of their lives.

CHAPTER SECOND.

OF THE SEVERAL KINDS OF THINGS.

THE word things, is a very extensive term, and comprehends whatever cannot be predicated of a person, or human being. There are many things which are subject to the property and dominion of man ; and in that light, they are to be considered in this book of our enquiries.

Property in its strict and literal sense, is only that right and dominion, which a man has by law in things. But by a very common figure, this term is used to signify the thing itself, in which a man has property. The word property, therefore, signifies things, over which, man is in the immediate exercise of power and dominion. The word things is a naked description without any reference, or relation to ownership by man.

Things are naturally divided into *real* and *personal*. Things real, are permanent and substantial. They are immoveable as to place, and perpetual as to duration. Things personal, may properly be also called moveable. They are the reverse of things real, the owner can remove them from place to place, their duration is uncertain, and they are subject to change and to perish. Such is the natural division of things, and it compleatly comprehends every species. But the institutions of civil society have made necessary other divisions of property, for the purpose of regulating its improvement and enjoyment : and this being the point of view, in which we are to consider things, I shall make such distinctions and divisions as have been introduced and established by law. In addition to this general division, we find there is a species of property denominated incorporeal, which is defined to be an ideal right, existing in contemplation of law, and issuing out of substantial, corporeal property, either real or personal. Personal things have been subdivided into chattels real, and chattels personal. Chattels real, have been defined to be a compound of real and personal things, possessing the immobility of the one, and the limited duration of the other, as an estate for years in lands, the land being immoveable, but the term to expire in a limited period. Chattels

personal, are comprised in the usual definition of things personal. In treating of these different kinds of property, I propose in the first place to consider things real as being the most important to mankind. With this subject, I must consider chattels real, because they result from and are an appendage of real property.

In the next place, I shall fully explain the subject of personal property; and shall close with a few observations upon things incorporeal, as they are the fruits of the other kinds of property. On this subject, I shall be very concise, as there can hardly be said to be a necessity of introducing this division of property into a treatise upon our laws; but as it is known to the common law, it may be proper to explain it, for the purpose of assisting the reader in acquiring a knowledge of the common law.

CHAPTER THIRD.

OF THINGS REAL.

THINGS real have already been defined to be fixed, permanent, and substantial. In observing upon this subject, no better method can be pointed out, than the one adopted by Sir. William Blackstone, in his commentaries on the laws of England. To define in the first place the nature of real property, in the second place, the tenure, in the third, the different estates that may be had in it, and lastly, the various titles to it, and the manner in which they may be acquired or lost. This chapter will consider the first of these divisions and define the nature and extent of real property.

It is generally said, that things real consist of lands, tenements, and hereditaments. ^b Land in its legal and most extensive signification, comprehends every kind of real property. It includes any ground, soil, or earth whatever, as arable, meadows, pastures, woods, moors, waters, marshes, furses, and heath. It also in its legal meaning comprehends all houses and buildings whatever, standing on the land: for they consist of two things, the ground being the foundation, and the structure thereon; of course, if the land, or ground be conveyed, the building being annexed to it is transferred with it.

Land

^b Co. Lit. 4. 2 Black. Com. 17.

Land in its most natural and vulgar meaning, includes nothing but earth ; but the law has annexed to the word this artificial meaning, by which it comprehends every thing upwards in a direct line to the heavens, and every thing downwards in a direct line to the center of the earth. No person has therefore a right to erect a building that shall hang or reach over his neighbour's land ; nor to dig a mine that shall run under his neighbour's land. The owner of the surface of the ground, owns all that is over and under it,—and the conveyance of land simply conveys, not only the face of the earth, but all mines, woods, waters and buildings, as well as fields and meadows. It is true, that these particular things, excepting water, may be granted, or conveyed by their respective names : but nothing will pass thereby but the thing specified, and what falls literally within the meaning of the term made use of ; but land being a general term, the conveyance of it transfers every thing annexed to it either above or below the surface, not only buildings, and mines, but corn, fruits, and herbage growing thereon, which are considered as a part and parcel of the realty till severed from it. So whatever is fastened to a house, is considered as part of the realty, and passes with the building. It seems singular, that water should pass under the denomination of land ; but the fact is, that water cannot be conveyed on account of its perpetual fluctuation, and change, and no man has any thing more than a temporary, usufructuary property in it : but the land, or ground covered by water, is permanent and substantial, and the conveyance of it by operation of law, conveys the water that covers it. A grant of the water passes only a right to use it, or a right of fishing.

Tenement is a word of more extensive signification than land, tho' generally speaking it is applied only to buildings, yet in its primary and legal sense, it includes every thing that may be holden, and is of a permanent nature, whether corporeal, or incorporeal.

Hereditaments by the English common law, is said to be a term of still larger signification, comprehending not only lands and tenements, but every kind of property that can be inherited, and which on the death of the owner, descends to his heirs, and goes not into the

the hands of the executor or administrator. By the English common law, certain implements of furniture, of a personal nature, under the name of an heir-loom, descend by custom to the heir, together with the house, which being inheritable, are called hereditaments, as well as lands. But our law knows nothing about heir-looms. If we take the word hereditament according to the English definition, that is, to comprehend every thing that can be inherited—then the word would be as extensive as the word property, because every species of property by our law can be inherited: but the word has never been extended beyond the meaning of it as limited by the English law, and as we know of no personal property, that can come within the idea of an heir-loom, the consequence is, that this word here can be of no larger import than lands or tenements, and whenever it is used in our statutes, it is not intended to comprehend any thing but real property, particularly as it is used in the statute of frauds and perjuries. As hereditament is nearly synonymous with other words, as it is apt to lead the mind to mistakes concerning it, by the common law definition of it, and as there can be no necessity for the use of it, to explain our law, it must be considered as an improper and unnecessary term, and ought to be rejected.

CHAPTER FOURTH.

OF THE TENURE OF THINGS REAL.

WE can hardly say with propriety, that there is a tenure of our lands, for this seems to imply upon the principles of the feudal system, a holding them of some superior. But the truth is, that our lands are not holden of any person. Every proprietor has an absolute and direct dominion in his own right in the soil independent of any superior.

As that branch of our jurisprudence, that respects landed property, has never been embarrassed with the slavish principles of the system of feuds, it will be unnecessary to enter into an investigation of that copious and interesting subject, a subject which has been illustrated and exhausted by the labours of the greatest literary characters

acters in the republic of letters. It would be a rich source of amusement to ascend to the origin of that system, and trace its progress and variations to the present period. But as this is not within my plan, I shall confine my researches to a few observations that respect the laws of this state.

In the settlement of this country, our ancestors, as soon as they united in society, considered the right to the territory, to be vested in the public, and proceeded to make grants to individuals. The charter of Charles II. confirmed the title of the lands, to be holden of him, his heirs and successors, in free and common socage, rendering as a rent, one fifth part of the profits of all the mines of gold and silver, that should be discovered in the granted territory. Socage at this time was the freest and noblest tenure in England. Such lands were said to be holden of some superior, on the consideration of rendering a rent reduced to a certainty, and of a free and honourable kind; but as there were no mines of gold and silver within the territory granted by the charter, there was no actual reservation of any rent. Of course, the lands were only nominally holden in socage, but the proprietors had in effect, an absolute allodium. On the separation of this State from the British empire we ceased to hold our lands by the nominal tenure of socage, tho in the revision of our laws in 1784, the statute was retained, which declared the tenure to be free and common socage, yet as the proprietors of our lands were not subjected to any of the duties required of tenants in socage, they could never be considered otherwise, than holding allodial estates.

Since writing the foregoing, the legislature have passed the following act. An act declaring the tenure of lands in this state.—Whereas by the charter of Charles II. the lands in the then colony of Connecticut, were holden of the king of England, by the tenure of free and common socage, and by the establishment of the independence of the United States, the citizens of this state, became vested with an allodial title to their lands. Be it therefore declared, That every proprietor in fee simple of lands, has an absolute and direct dominion and property in the same.

OF THE SEVERAL KINDS OF ESTATES IN THINGS
REAL.

AN estate in lands, signifies the interest that the owner has in them. Estate is a term common to all kinds of things, and is frequently used as synonymous with property, including the thing itself, as well as the interest the owner has in it. We have heretofore remarked, that property literally speaking, was applicable only to the dominion and ownership we have in things, tho by custom, it is now extended to the things themselves. Thus, estate properly signifies nothing but the kind, or quantity of interest, that the owner has in things, tho by custom it has been extended to the things themselves: but in our present enquiries, the term will be taken in its literal sense.

Estate then may be defined to be a term importing the state, condition, and circumstances of the owner, in respect to his property. To obtain a precise idea of estates, we must consider them in a threefold view: first in respect of the quantity of interest the owner has in things: secondly, the time such interest is to be holden and enjoyed: and thirdly, the number and connexion of the owners.

We begin in the first place, to consider estates in respect of their quantity of interest. This is ascertained by their duration and extent, and the power of the owner to use and improve. Estates therefore must necessarily be of different kinds. Some are for the life of the owner, or of some other person, being as uncertain as the lives of men. Others are reduced to certainty, being circumscribed in a limited period of time, as so many years, months, or days; or estates may be unlimited and perpetual, being vested in the proprietor, and his heirs and assigns forever. The power of the owner to improve his lands, is according to the nature of the estate. An absolute proprietor may improve them according to his own pleasure, while a person who has a limited estate must improve it according to certain restrictions resulting from the nature of it. Thus the duration of the estate, and the power of using it, determine the quantity of interest.

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The most general and primary division of estates, is into estates of freehold, and estates less than freehold. An estate of freehold, by our law, may be defined to be where the proprietor has a lawful right to things real, to hold and improve them for the term of his own life, and all such proprietors may be denominated freeholders. Estates of freehold are subdivided into freehold-estates of inheritance, and not of inheritance, being for life only. The former are divided again into estates of inheritance, absolute, or fee-simple; and estates of inheritance, limited or fee-tail. Estates not of inheritance, or for life, are divided into conventional or such as are created by the act and agreement of the parties, and such as are legal, resulting from the construction and operation of law. The former comprehend estates created by leases for life, and the latter where a person is tenant by the curtesy, and a widow is tenant in dower. Estates less than freehold are divided into three kinds. Estates for years, estates at will, and estates by sufferance.

By the law of England, every owner or holder of lands, is called tenant, such as tenant in fee simple,—fee tail,—for life, or years. This originated from a doctrine in the feudal system, that the absolute property of the soil is in the king, and that all the subjects hold of him, as the superior lord. This properly establishes them to be tenants. But in this state, we never apply the word tenant to the owner of an estate in fee. He may properly be denominated the proprietor in fee, for the purpose of expressing the independent nature of our title to real property. The term tenant, has ever been applied to those persons, who having an estate, less than fee simple, may with propriety be said to hold of, or be tenants to the proprietors in fee.

No person is considered in contemplation of law, to be the owner of real property, unless he has a freehold estate. All estates of an inferior nature, are called chattles real, and the owners are deemed to have nothing but a usufructuary right in the soil.

CHAP.

OF ESTATES IN FEE SIMPLE.

THIS is the largest and noblest estate that a man can have in real property. The proprietor is invested with an absolute power to improve and dispose of his lands as he pleases. Almost all our estates in this government are of this nature. Our ancestors being animated with the spirit of freedom and equality, at the time of their emigration from England, where they had experienced the inconvenience of feudal restraints upon landed property, were determined to hold their possessions by the freest tenure, and clearest title. To this happy circumstance we are now indebted for singular advantages and privileges. Had this country been first settled by a colony under the direction and controul of the British crown, it is probable that our lands would have been incumbered with all the restraints of the feudal system, and our titles involved in the labyrinth of English jurisprudence. But as the government at first, granted the territory to be holden in estates in fee simple, so the subsequent conveyances have generally passed similar estates. In consequence of this, almost all the lands are now in the actual possession and improvement of proprietors in fee. As we never have admitted into our code of laws, the doctrine of primogeniture, or the entailment of estates, our lands are distributed among the proprietors in that equal manner, which is favorable to the highest cultivation, and calls forth the greatest exertions of industry. We behold Connecticut divided into well-proportioned farms, exhibiting a rapid progress in agricultural knowledge, and possessed by a race of respectable farmers, in the enjoyment of that ease, independence and moderate affluence, which produce the most permanent felicity, which falls to the lot of any portion of mankind.

To understand this subject, we must explain the meaning of fee simple. The term fee is derived from the law of feuds, which was established in Europe by the conquerors of the Roman empire. In the division of the lands by those conquerors, two kinds of estates were granted, which were distinguished by the name of feud, and allodium. Feud, fief, or fee, may be defined to be an estate in lands, holden by a tenant of some superior lord, and granted to him originally

ginally as a stipend or reward for services done, and were to be holden on condition of performing further services, which rendered it a conditional estate. Such estates were granted to the vassals of the chiefs and leaders who made conquests of parts of the Roman empire. Allodium, or alleud, may be defined to be an absolute estate in the proprietor, holden unconditionally and independent of any superior. Such estates were granted to the freemen of the nations, who attended the northern conquerors in their successful expeditions. These estates were however converted into feuds, which in the progress of society underwent an infinite variety of changes, and gave birth to that intricate system of jurisprudence, respecting landed property, which has so long employed the researches of the lawyer and antiquarian.

To hold lands in fee, according to the primary meaning of the term, was to hold of some superior, upon condition of rendering certain services, while the ultimate property of the soil rested in the superior. *f* But in England this term is not now used in its primary sense. A fee is defined to be an estate of inheritance, being the highest interest that a man can have in lands. When the word fee is used without any addition, or with the addition of the word simple, it is opposed to fee conditional, or fee-tail, and denotes an unconditional, unlimited estate, transferable at pleasure, and descendible to the heirs general. Such is the meaning of this term, as used in our laws. But considering the nature of the tenure of our lands, we may with propriety say that fee is synonymous with allodium, and in this light it will be contemplated in our ensuing enquiries.

The incidents to estates in fee simple are, that the proprietor has the power to transfer, and devise them to whom he pleases, that they descend to his heirs generally, according to the statute law, in case no disposition is made by will, that he is accountable to no person for their use and improvement, and may commit waste, or do any act which he pleases.

g The fee simple in all lands rests and resides at all times in some person. This being the largest possible estate, it comprehends all inferior and lesser estates into which it may be divided. If a proprietor

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f 2 Black. 106. *g* 2 Black. 107. Co. Lit. 341.

prietor in fee makes a lease for years, the freehold remains in him, and his heirs, and the lessee has only a temporary estate, inferior to a freehold, and at the expiration of the lease, the land reverts to the grantor in fee. An estate of freehold in fee simple, may be divided and carved out into all the inferior and lesser estates, and on the expiration of such estates, the lands revert to the proprietor in fee. The fee simple of lands is sometimes in abeyance, in remembrance in law, there being no person in existence, where it can actually vest: yet it exists in idea, and vests in the proper owner whenever he appears. Thus for example, in a grant to one man for life, and then to the heirs of another forever, it is evident that the fee simple is not in him, who has the estate for life, and the heirs of the other can never be known till his death, for nobody is the heir of the living, therefore there is no person in being who has the fee simple, of course it remains in abeyance.

b It is a general rule of law, that to create an estate of inheritance by deed, it is necessary to use the word heirs, and that no circumlocution, or other words, will supply the want of that word. A conveyance to a man and his assigns forever, transfers only an estate for life. *i* This general rule however, does not operate in devises; for these having been introduced at a later period, their construction has been more liberal. If the devise contain words that sufficiently evidence an intention in the devisor to transmit an absolute, perpetual estate, then the intention of the devisor shall be pursued, and the devisee shall take an estate of inheritance. Thus a devise to a man forever, to one, and his assigns forever, or to one in fee simple, will vest an estate of inheritance in the devisee, because the words sufficiently evidence such an intention in the devisor, tho he does not use the word heirs. But a devise to a man, and his assigns, without annexing words of perpetuity, transmits only an estate for life.

k In grants of lands to corporations, the word, heirs, is not essential, because corporations have no heirs, but the word, successors, seems to be the proper term, denoting the same relation between corporate persons, as the word heir, and ancestor, between natural persons; therefore in grants to corporations, successors usually

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b 2 Black. 107. *i* Ibid. 108. *k* 2 Black. 109.

supply the place of heirs ; but this is not necessary, because, the grant to a corporation without words of perpetuity, will create only an estate for life, yet as a corporation never dies, an estate for life must be as large as they can possibly take. Of course, a simple grant to a corporation, constitutes a perpetual estate equivalent to a fee simple.

CHAPTER SEVENTH.

OF ESTATES IN FEE-TAIL.

ESTATES in fee tail, are where the lands are limited to some particular heirs, and do not descend to the heirs in general. To explain this subject clearly, it is necessary to recur to the English law, and deduce the origin of these estates.

At common law estates in fee simple were of two kinds. Fee simple absolute, which we have considered in the preceding chapter, and fee simple conditional, which we are now to consider. A conditional fee was restrained to some particular heirs, in exclusion of others, as a limitation to the heirs of a man's body, which admitted lineal, and excluded collateral heirs : or to the heirs male of a man's body, which excluded collateral and female lineal heirs. But to all estates of this kind, a condition was either expressed, or implied, that if the donee died without such particular heirs, the land should revert to the donor. The estate therefore, was a fee simple, on condition that the donee had issue. When the grantee had issue born, the performance of the condition vested in him an absolute estate, with power to alien, so as to bar his own issue, and the reversion to the donor, and to charge it with certain incumbrances, binding on his issue, and such estates were then subject to forfeiture for treason. But if no alienation was made by the donee, then in default of such heirs as were described in the deed, the land at any future period would revert to the donor, because no heirs could take by descent, only those to whom the estate was limited. It therefore became the practice for the grantees, as soon as the condition was performed by the birth of issue, to alien to some friend, and then instantly repurchase, and take back a conveyance, which rendered the estate a fee simple absolute, defeated the condition, barred the

1 Co. Lit. 19.

2 Black. Com. 310.

2 Inst. 333.

the reversion to the donor forever. But the nobility discovering that this practice defeated them of their reversions; and prevented them from perpetuating their estates in their families, procured to be passed in the reign of Edward I. the celebrated statute of Westminster the second, which enacted, *m* that the will of the donor as expressed in the deed, should be observed, and that the donee should not on birth of issue, alien the estate : but that the same should remain to his heirs, if he had any, and on failure, should revert to the donor, or his heirs. In construction of this statute, the judges determined, that the donee had not a conditional fee, but they divided such estates into two parts, leaving to the donee a new kind of estate, which they denominated fee-tail, signifying a limited estate, and vesting in the donor, the ultimate fee simple of the land, expectant on the failure of the issue, which is called a reversion.

These estates are divided into general and special. Tail general is where lands are given to one and the heirs of his body begotten, which allows his issue by every marriage to inherit the estate. Tail-special, is where the estate is restrained to certain heirs, as the heirs of his body, on Mary his now wife to be begotten, which excludes issue by any other marriage. These are subdivided into tail-male, and tail-female, both which may be general and special, for the purpose of distinguishing the sexes, to whom they are limited to descend. The word heirs in the donation, is necessary to create a fee, and some words of inheritance or procreation, are necessary to make a fee-tail, as heirs of his body, or heirs of his body, to be begotten on his wife. The omission of his heirs can be supplied by no other word, and such deed will transfer only an estate for life.

The entailment of estates being found extremely inconvenient, and detrimental to the public, by aggrandising particular families and preventing the free transfer and alienation of landed property, every possible method was devised to exonerate it from these restraints. The collusive fictions of fines and common recoveries, were introduced for the purpose of docking entailments, and became a very common mode of conveyance in England. Statutes were made at different periods, which subjected estates in tail to forfeiture

m 2 Inst. 332.

forfeiture for treason, made them chargeable for debts due to the king, and liable to be sold for debts contracted by a bankrupt tenant.

The incidents to estates-tail, by the law of England, are that the tenant may commit waste, his wife shall have her dower, the husband of a female tenant in tail, may be tenant by the curtesy, and that an estate tail may be barred, or destroyed by lineal warranty, descending with assets to the heir.

In this state, it has been supposed by some, that the English law respecting the entailment of estates was in force. Estates of that kind have been created, and common recoveries have been suffered. But this was an erroneous opinion. " Our courts have never recognized the doctrine of conditional fees at common law, and have never admitted of estates in fee-tail. A statute has lately been passed in affirmance of a principle of common law, adopted and established by the courts of judicature. *p* By this statute it is enacted— " that no estate either in fee simple, fee tail, " or any lesser estate, shall be given by deed, or will, to any person, or persons, but such as are in being, or to the immediate, " issue or descendants of such as are in being, at the time of making such deed or will. And that all estates given in tail, shall " be and remain an absolute estate in fee simple, to the issue of the " first donee in tail." Such is now our statute law, and such has ever been our common law. Here we have the pleasure to observe that the transfer of our lands, is not fettered and burdened by the restrictions and incumbrances, with which they are perplexed and embarrassed in England; and that we have no occasion to acquire a knowledge of this branch of their jurisprudence, only to explain some terms that have been borrowed from it, and introduced into our own.

In construction of this statute, it may be observed, that all deeds, or wills, that contain the words of limitations used in England, vest an estate in fee-tail in the first donee, and a fee simple absolute, in his issue or descendants. All such estates therefore during the life of the first donee, partake of the legal qualities of such estates in England, but have a total different operation after his death

a Kirb. 118. *o* Ibid. 175. *p* Statutes. 3.

death. To create an estate-tail, by our statute there must be some words of inheritance, or procreation made use of—as heirs of his body—otherwise, it will be a fee simple. All gifts in the form prescribed by the law of England, to create an estate-tail, will create one by our law.

The first donee, or tenant in tail, cannot alien for a longer time than his own life, so as to bar the issue, or the reversion. The policy of this regulation by our statute is apparent. The father may discover in his son, marks of prodigality and profusion, that would render it unadvisable to vest him with the absolute property of lands. By this mode, he may make a safe provision for him during his life, and prevent him from running into extravagance, by depriving him of the power of squandering away his property; and the limiting of an estate for a single life, is not productive of the inconveniences of perpetuities. Tenant in tail, cannot do any act by which he can make the lands chargeable with his debts, after his decease.

It is not in the power of the first donee in tail, to do any act by which he can become invested with a fee simple, and defeat the issue or reversioner. As the statute has expressly authorised the proprietor in fee, to carve out such an estate, it precludes the existence of a power to defeat it. It therefore may be established as a general principle, that fines and common recoveries, or any mode that has been adopted in England, cannot be introduced here, to dock such entailments as are warranted by statute. To allow such a power would be defeating the humane and beneficial intentions of the law. It would prevent a father from making suitable provision for the support of a prodigal son during life, because it would allow the son a power to invest himself with an absolute estate in the lands conveyed to him for life, and by squandering it away, defeat the benevolent design of a parent, and disinherit his own offspring.

In England, common recoveries were introduced to unfetter the perpetual entailment of estates, which reduced the nation to slavery, and discouraged industry and agriculture. But as in this state

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we admit only of an entailment for a single life, which is dictated by sound policy, and produces none of the mischiefs of perpetuities, it is manifest that no method can be allowed to defeat it.

Upon a failure of issue of the first donee in tail, the land shall revert to the donor, or on his decease to his heirs, and shall not vest in the collateral heirs of the donee. But if the donee die, leaving sundry children, the estate will vest in the particular heir or child to whom it is limited.

As our statute has borrowed the description of an estate from the English law, it necessarily recognises all the incidents that result from the nature of it. The incidents then to an estate in tail, are the four following.

1. The first donee, or tenant in tail, may commit waste on the land by felling timber, pulling down houses and the like, without being impeached, or called to account therefor, in as ample a manner as proprietor in fee can do. 2. The wife of the first donee shall have her dower, or thirds in the estate tail. 3. The husband of a female tenant in tail, may be tenant by curtesy of the estate-tail. 4. An estate tail, may be barred, or destroyed by lineal warranty, descending with assets to the issue of the first donee, that is, if such donee alien in his life time, with warranty, and then leaves sufficient estate, which descends to the heirs, to make good the warranty, by which they would be liable on the covenants of warranty, in case of an eviction of the purchaser of the estate-tail, then such heirs shall be barred of a recovery of such estate, so aliened by their ancestor : because it would be an absurdity to allow them to recover the lands of the purchaser, and then make them liable to pay back to him the value of it, upon an action brought against them upon the covenant of warranty.

But it is probable that all our learning respecting estates in fee-tail, will soon go into disuse ; for in consequence of the restriction of the statute, all the purposes of a conveyance allowed by it, may be answered by a person's making a gift to a man for life, and then to the heirs of his body forever, or any particular heir, which

is all that can be done by an estate tail, and in this case the donee is tenant for life, instead of tenant in fee-tail.

CHAPTER EIGHTH.

OF ESTATES FOR LIFE.

ESTATES for life, are freehold estates, not of inheritance, and there are three kinds known by our law. The first is created by the act and agreement of the parties. The other result from the operation of law, and are where a man is tenant by curtesy, and a woman tenant in dower.

I. *g* Estates for life created by the act of the parties, are, where a man by deed, devise, or lease, grants lands to another, to hold for the term of his own life, or for that of any other person, or for more lives than one. Where the grant is to a man for his own life, he is called tenant for life: where the grant is to a man for the life of another, he is called tenant for another's life. The most usual method of creating estates for life, are by lease: but they may be created not only by express words, but by a general grant without defining any estate. As where a man grants lands to another, without specifying any estate, or heirs; this makes him tenant for life, for as no words of inheritance are inserted in the deed, it cannot be construed to be a fee; but the estate shall be construed to be as large as the words in the deed will warrant, and therefore if the grantor have authority to make such a grant, it shall be construed to be an estate for the life of the grantee.

All estates for life, are generally considered to endure for the life of the person to whom they are granted. There are however, some estates for life, dependent on future contingences, which may be determined before the life for which they are created, expires. As where a man has an estate given to him for the life of another, or a woman during her widowhood, when the person for whose life the land is holden, dies, or the widow marries, the estates are determined and gone; yet while they continue, they are deemed

deemed to be estates for life, because their duration is uncertain, and they might possibly have endured for the life of the tenant.

The incidents to estate for life are. 1. Tenant for life, when he is laid under no restrictions in the deed by which he holds, may of common right take from the land necessary wood to repair or burn in his house, to make or repair instruments of husbandry, and to make and repair necessary fences on the land. By the common law he has right to improve the land in the same manner as tenant in fee, without impeachment of waste; and if he commit waste, no action will lie against him, and this seems to be the distinction adopted in the law, that where an estate is created by act of the parties, the tenant cannot be impeached of waste, because it is in the power of the grantor to secure his interest, and lay the tenant under proper restraints by the deed that creates the estate; but where estates for life result from construction of law, the tenant shall be restricted from the commission of waste, and if he do waste, shall be liable to an action, because it never was in the power of the heir in interest, by a contract, to limit or restrict the tenant in the use of the land. It is therefore necessary for every person when he grants an estate for life, to restrain the tenant by the deed from the commission of waste. But in England, by the statute of Gloucester, tenants for life, as well as years, are liable to an action of waste. Such is the common law, as stated by Coke, and Blackstone, but Reeve contends, that tenant for life, was punishable for waste by the common law.

2. *f* Tenant for life, shall not be injured by any sudden and unexpected determination of the estate, because the determination is contingent and uncertain. It is a general rule, that in all cases where the determination of an estate for life is dependent on a contingency, if it be determined by the act of God, or the act of the law, the tenant, unless the estate be determined by his death, and then his representatives, shall have the emblements, or profit of the crops growing on the land at the time the estate is determined: but if the estate be determined by the act of the tenant, the emblements shall go to the proprietor in fee. If a tenant for life sows the land, and dies before harvest, his executor shall have

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See vol. ii. 83. *f* 2 Black. Com. 122. Co. Lit. 55.

the emblements or profits of the crop : for the estate was determined by the act of God, and it is a maxim of law, that the act of God does no man an injury. The representatives, therefore shall have the emblements to compensate for the expence of sowing, and as an encouragement to husbandry, which would be discouraged in all estates of uncertain duration, if the tenant could not know with certainty, to whom the profits of his labour would go. If a man be tenant for the life of another, and he, on whose life the land is held, dies after the corn is sown, the tenant shall have the emblements. So if a lease be made to husband and wife during marriage and the husband sows the land, and afterwards they are divorced, by which the estate is ended, the husband shall have the emblements, because the divorce is the act of the law. If a tenant during widowhood, thinks proper to marry, she determines the estate by her own act, and shall not have the emblements. The doctrine of emblements extends to all corn sown, roots planted, and every thing that yields an annual artificial profit, in consequence of the labor of the tenant ; but does not extend to fruit, trees, grass, and the like, which are not planted annually at the expence, and labour of the tenant, but are either the permanent, or natural profits of the earth.

3. * If tenants for life lease out their estates to under-tenants, they shall enjoy all the privileges of the tenants for life, and in addition to them, shall not be prejudiced by the determination of the estate, by the act of the tenant for life, but in all such cases they shall be entitled to the emblements ; as if a tenant during widowhood marries, and determines the estate, yet the under-tenant shall have the emblements.

II. * Tenant by the curtesy, commonly called the curtesy of England, results from construction and operation of law, and is defined to be where a man marries a woman possessed of a freehold estate of inheritance, and has issue by her, born alive, capable of inheriting the estate, that in such case he shall on the death of the wife, hold the estate for his own life. To constitute this estate, the requisites are, that there be a lawful marriage, that the wife be actually possessed of the lands, and not have a mere right to possess,

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* 2 Black. Com. 123.

* Ibid. 126. Co. Lit. 29.

so that a man cannot be tenant by curtesy of a remainder ; that issue be born alive, that might by law inherit, that it be born during the life of the mother, and not be delivered by the Cæsarean operation, and that the wife be dead.

The reason why this kind of estate is so denominated, is said by Littleton to be because it was in use only in England : but it appears by other writers to have been established in other countries. The origin of it is attributed by Blackstone to the feudal law, and seems to have been derived from this principle, that if a man marries a woman possessed of lands and has children by her, as he is the natural guardian of the children, it is reasonable that he should have the use and improvement of the land, to support and educate them. On the birth of issue his title commences, and the law will not defeat it by any subsequent event.

This estate is founded upon a singular principle, the capacity of the parents to have children, and the circumstance of their being born alive. It would be more rational to say, that the husband should hold during life, the lands of the wife after her death, whether they had issue or not, or that he should hold them, in case the issue survived her, and it was necessary to have the improvement of the lands for their education and support : But that the circumstance that the child be born alive, whether it live one moment or not, should be the event, on which the estate depends, is one of those unaccountable whims, which are sometimes adopted by accident, and continued by the authority of precedent. It is still more extraordinary, that the husband should be defeated of the estate, if the child be delivered by the Cæsarian operation : for there is precisely the same reason, why the father should have the estate of the mother for the education of children delivered by this mode, as by the common mode.

As incident to this species of estate, the tenant may of common right, take from the land, necessary wood to repair, or burn in his house : to make and repair fences and instruments of husbandry : for he has a right to the use and enjoyment of the land, and all its profits, during the continuance of the estate. But he is not permitted to cut down timber, or do any other waste, which is a permanent

nent injury to the soil, and unnecessary to take the temporary profits of the estate. *w* And if such tenant commit waste, he is liable to the heir in an action of waste at common law.†

In respect of emblements, and under tenants, the same rules apply in cases of tenants by curtesy, as tenants for life.

III. Tenant in dower, is where a widow is endowed of one third part of the real estate her husband died seized of, during her life.

In the consideration of this species of estate, it will be proper to point out, who shall be endowed, of what she shall be endowed, the manner how dower shall be assigned, and how it may be barred or prevented.

I. The person entitled to dower, or as it is commonly expressed, to thirds, is designated by the statute concerning the dowry of widows, which enacts, *x* that every married woman, living with her husband in this state, or absent elsewhere from him by his consent, or through his mere default, or by inevitable providence, or in case of divorce, where she is the innocent party, that shall not before marriage be estated by way of jointure, shall immediately upon and after the death of her husband, have right, title, and interest, by way of dower, in and unto one third part of the real estate of her deceased husband, in houses and lands, which he stood possessed of, in his own right, at the time of his divorce, to be to her during her natural life. This statute makes provision for widows generally, and in one instance is so complaisant to the female sex, as to entitle a woman to dower, in the lands of a man not her husband at his decease. This happens in the case of a divorce, where the woman is the innocent party. The divorce operates as a compleat dissolution of the marriage contract, yet the humanity of the law, will not permit a man to abuse his wife in such a manner, as to compel her to obtain a divorce, and thereby defeat her of her dower. On this statute a curious question may arise—Suppose a woman being the innocent party obtains a divorce, and both are again married, and then the man dies,

w Rose vs. Hays, S. C. 1791. *x* Statutes, 42.

† This decision of the superior court adopts the doctrine of common law, laid down by Coke—but a contrary opinion is maintained by Reeve, in his history of the English law. See Vol. ii. 83.

dies, shall his lawful and divorced wife, both be endowed of his lands? Can a woman having one husband, be endowed of the lands of a former husband? Upon a literal construction of this statute, these questions must be answered in the affirmative.

It seems to be a necessary construction of the statute, that a woman is not entitled to her dower, when she absents herself from her husband wilfully, without just cause, and continues to be absent unnecessarily, until his death. Such conduct, being an open infraction of the marriage contract, a forfeiture of the right of dower, is a proper punishment, and will operate as an additional inducement upon women, to pay a proper attention to their husbands, in the hour of sickness and distress. Tho the statute does not express this, it fairly implies it. A woman shall be endowed when absent without a fault of her own; if her absence be owing to her own fault, it follows that she loses her dower.

y By the common law, a woman must be more than nine years old, at the decease of her husband, to be endowed of his lands.

2. A woman is to be endowed by the statute, of all the houses and lands, her husband was possessed of in his own right, at the time of his decease; but has no claim upon lands aliened by him in his life time. By the common law, the wife had her dower in all the lands her husband ever owned, tho he had transferred them. This inconvenient encumbrance, on the alienation of real property, is repugnant to the policy of our laws, and has never been introduced.

z A question has arisen, whether by the statute, the widow has a right upon the death of her husband, to enter immediately into the actual occupancy of her thirds, in the real estate of which he died seized, in common with the heirs, or whether she has right only to have dower assigned, and till that is done, has no right to enter and occupy. It has been decided by the superior court, and the judgment affirmed by the supreme court of errors, that one third of the real estate, of which the husband dies possessed in his own right, immediately vests in the widow for life, in common with the heirs, before assignment, and does not depend upon being
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set out, any more than the right of an heir depends upon the distribution of the estate ; and that the distribution only severs the right which was as compleat before as after.

3. The mode of endowing a widow, is described by the statute. “ *a* That if the person, or persons that have by law a right to inherit the estate, do not within sixty days after the death of the husband by three sufficient freeholders of the the same county, to be appointed by the judge of probate, in whose district the estate lies, and sworn for that purpose, set out and ascertain such right of dower, that then such widow may make complaint to the judge of the court of probate in whose district the estate lies, which judge shall order and decree, that such woman’s dowry shall be set out and ascertained by three sufficient freeholders of the county, who shall be sworn, faithfully to proceed and act therein according to their best skill, and the said dowry being ascertained and set out, in either of the methods aforesaid, and upon approbation thereof by said judge, such dower shall remain fixed and certain, and all persons concerned therein shall be concluded thereby.” *b* A subsequent statute, has vested this power in the court of probate, who has probate of the will, or the power of granting administration on the estate.

4. A woman may be debarred of her dower by elopement, or wilful absence from her husband, or by accepting a provision made for her by her husband, in his will in lieu of dower. A woman is not compellable to accept of such provision, but may refuse it and take her dower at law. If she accept such provision, she is bound thereby, and her dower is discharged. *c* But the dower of a widow is not barred by lapse of time. It is a charge upon her husband’s estate, which no alienation of heirs, or creditors can defeat.

A woman that has been estated by way of jointure, before her marriage; is by statute barred of dower. This is all that our statute law says respecting jointures. We must therefore have recourse to the common law, for the explanation of a word recognized by the statute. *d* A jointure, may be defined to be an estate in

a Statutes, 42.

b Ibid. 486.

c Crocker vs. Fox, S. C. 1790.

d 2 Black. Com. 137.

in lands for the life of the wife, at least competent for her livelihood, to take effect in profit or possession, presently after the death of her husband. The title to the lands conveyed as a jointure must be valid, or it will not bar dower. If a jointure be made after marriage, the woman at the death of the husband may accept it, or refusing it, may have recourse to her dower at law. The word jointure originally signified, a joint estate to the husband, and wife, but extends also to an estate limited to the wife only. A jointure therefore may be created by any form of conveyance, that secures to the wife, the use or improvement of lands, for her life at least, and which ought to be expressed, to be in lieu of all her dower, and not of any particular part of it.

Jointures originated in England from the introduction of uses, by which one person had the use and another the property and possession of lands. As a woman could not be endowed of a use, jointures were invented, by which lands were conveyed to the joint use of husband and wife, during their lives. As uses have never been generally introduced into this state, the making of jointures has not become a common practice.

As to the incidents of this species of estate, they are the same as in tenancy by the curtesy. But in addition to the liability of the tenant, to an action at common law, for the commission of waste, the statute has provided—that every widow endowed of lands and houses, shall maintain all such houses, buildings, fences, and enclosures, as shall be assigned, and set out to her in dower, and shall leave the same in good and sufficient repair, and on failure thereof, the county court in the county where the estate is, on application made, may deliver so much of the said houses, and lands to the next heir of the same, as they shall judge to be sufficient, out of the rents and profits of the same, to repair such defects, unless such widows will give sufficient security for leaving the same in good repair.

OF ESTATES FOR YEARS.

ESTATE for years, or tenant for years, is where a man has the use and possession of lands, by a contract with the proprietor for a certain and determinate period. The method of creating such estates, is by lease, and the parties are denominated lessor and lessee. They are a middle kind of estate, between an estate for life and a tenancy at will. Let the period be ever so short, or long, yet in contemplation of law, it is deemed an estate for years, a year being the shortest period the law regards. Thus where a person has a lease of lands for three months, the law respects him as tenant for years, tho he can improve the lands no longer than the period limited in the lease. So a lease for a thousand years, is considered only as an estate for years, and the lessee has only a chattel interest, which by the common law, goes into the hands of the executor or administrator after his decease. The estate of such lessee, is not a freehold, while a person who has an estate for life, is considered as a freeholder, tho in the ordinary course of things it is not possible that such estate should subsist for so long a period, as the former. The reason of this distinction will be easily comprehended from a concise view of the origin of leases.

In the early periods of the English government, a lease for years was of small account, and was not permitted to extend beyond the term of forty years. They were made use of by the lords of manors, for the purpose of improving and cultivating the large tracts of territory, which they owned. To answer this purpose, short leases were as effectual as long, because the parties might renew them as often as they pleased. These leases for years, were at first under the power and controul of the proprietors of the lands, and might be defeated by a feigned recovery or conveyance, which rendered them for a period ever so long, a precarious and uncertain interest. In the reign of Henry VII. it was determined that leases for years should not be defeated by feigned recoveries, and untrue conveyances, but that the lessee should hold and recover possession of the land. This introduced leases for long terms, and they were used for the purpose of borrowing money upon them

them, as well as for many other purposes, different from the original design of leases. When the term for which such leases could be made, was enlarged, these estates were considered of the same nature and subjected to the same regulations as leases for short periods. It would have been extremely inconvenient to have adopted different rules for long and short terms. They were all estates for years, and of course of the same nature, and it would have been difficult to fix upon a particular period, or number of years that should divide between estates for years, and freeholds. It was therefore necessary to apply the same rules to all estates for a certain determinate number of years, however different their period of continuance might be. Such estates therefore are deemed inferior to freeholds, and are contemplated as chattels real.

In consequence of the inferiority of estates for years, to freeholds, they may be created to commence in future, that is, a lease to commence in three months, or by a certain day, is good. But the conveyance of a freehold estate, must take instant effect, and if the estate be to commence in future, it will be void. This doctrine depends upon the old common law principle, that livery of seisin, or delivery of possession is necessary to pass a freehold, which must be done to take instant effect, and not to operate in future. But estates for years, being less than a freehold, no delivery of possession was necessary to pass them, and of course they might be created to commence in a future time : but where a freehold estate in remainder, was dependent on an estate for years, livery of seisin must be made to the tenant for years, to pass the freehold to the remainder man. The tenant for years, on this principle is not said to be seized of land, he has no property in the soil, he has nothing but a right to use and improve for a certain term, which is called his interest in the term. This gives him a right of entry upon the land. And then he becomes possessed of the term for years. The legal seisin remaining in the proprietor in fee. Hence the word term not only signifies the time of the lease, but the interest of the lessee.

By the common law, the actual entry of the lessee was deemed necessary to render the lease compleat : but this is unnecessary by our laws ; and as soon as the lessee has obtained a lease, he there-

by acquires the right of entry, in case the lessor be in possession, or has the right of entry.

Every state for years, by whatever words created, must have a certain, a determinate period to commence and terminate. There must therefore at the time of making the lease, be some time ascertained by the express agreement of the parties, or a reference to some collateral act reducible to a certainty, which will fix the commencement and termination of the estate, or it will be void. Thus a lease to one person for so many years as another shall live, is void, for the term is uncertain, and can never be reduced to a certainty during the time of the lease : but a lease for so many years, as a particular person shall name, is good, because when he has named the number of years, the period is certain, and he is referred to by the parties, as the collateral thing to ascertain the period. A lease for twenty years, if a particular person named shall live so long, is good, because here is a certain period determined, beyond which the lease cannot possibly extend, tho it may cease at an earlier period, upon the death of the person named. If a lease have a false or impossible date, or no date, it takes effect from the delivery ; but where the time limited for its commencement is uncertain, it is void.

In respect to the incidents of this species of estate, it is clear, that all lessees for years, as well as proprietors in fee, and freeholders, may make leases for years. A lessee for years may assign or grant over the whole of his interest in a term, or he may grant it for a less number of years than he holds it, and such leases are called derivative leases : and such derivative lessee, is compellable to pay rent, and perform covenants according to the terms agreed in such grant, or assignment.

As to emblements, or the profits of lands sowed, or planted by the tenant for years, the general rule is, that where the expiration of the term depends upon a certainty, the lessee can take no benefit after the expiration of the lease, of any labour done before that time. If a man has a lease for a year, commencing and expiring on the first day of April, if he sow winter grain within the year, he shall have no right to reap it after the end of his term. For it is

is the folly of the lessee to sow or plant when his term must certainly cease before he can reap. So if the term cease by any act of the lessee, he is not entitled to the emblements. But if the continuance of the lease be dependent on any contingency, and this happens after the crop is sown, and before it is ripe, the lessee, or his representatives shall have the emblements.

A question has been agitated, whether the common law respecting emblements, where the termination of the lease depends upon a certainty, is obligatory in this state. It has been contended that in leases for years, which have generally been for short terms in this state, that it is the common understanding of the parties, that the lessee shall have liberty to sow winter grain, and reap it the season after the expiration of the lease, and that this is a reasonable construction in order to enable the lessee to take the full annual benefit of a farm. In making a lease, it is easy for the parties to make provision in this respect, by which the lessee may remove all doubts, and be secured in every right intended to be conveyed to him. But to admit such a construction respecting leases for years as has been insisted on, would be productive of the most dangerous consequences. It subverts an ancient and long established maxim of the common law, it destroys the express agreement of the parties, and admits of a construction of a lease, repugnant to the words of it. It render all contracts of this nature perfectly uncertain, because by this construction, it cannot be determined how much the lessee for years, may sow the last year of his lease, it may therefore be in his power to take the use of the land for the year after the expiration of the lease. To admit a construction of law subversive of the principles of contracts, is beyond the power of any court. As the common law respecting emblements, is founded in reason, and correspondent to the fundamental rules of contracts, it must be deemed obligatory in this state.

Tenant for years, is not not by the common law impeachable for waste. He has therefore all the power to do waste upon land, as a proprietor in fee, unless specially restricted by some clause in the lease. It is usual to restrict the tenant, to use and improve the premises according to the rules of good husbandry. This may
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be considered merely as a prohibition to commit waste, and leaves the tenant all the power given to tenants in dower.

CHAPTER TENTH.

OF ESTATES AT WILL, AND BY SUFFERANCE.

I. ^sESTATES at will, are where the tenant has the use and improvement of the lands during the will of the lessor. When the tenant has obtained the possession of the lands, he acquires an uncertain and defeasible estate, and is liable to be turned out of possession whenever the proprietor pleases. The tenant has the same power to determine the estate, as the proprietor, the estate being dependent on the will of lessor and lessee. The tenant shall not be prejudiced by any sudden determination of the estate by the lessor. For if the tenant sows, and the lessor before the corn is ripe, or before it is reaped, determines the estate and puts him out, yet the lessee shall have the emblements, and liberty to enter upon the land, to cut and carry them away. This is allowed on account of the uncertainty of the estate, for the tenant could not possibly foreknow when the landlord would determine the estate. As he could not guard against such an event, he shall not be prejudiced by it, but shall have the profits of the crop. Upon the same principles, the tenant after the determination of the estate, by the will of the lessor, shall have liberty of ingress and egress to fetch away his goods. But where the tenant by his own will determines the estate, he forfeits the emblements.

An estate at will may be determined by the express declaration of the lessor, of which he must give notice to the lessee, or by entering upon and taking possession of the land, or by giving a deed or lease for years, to commence immediately, or by the desertion of the tenant, his making an assignment of the estate to another, or by his committing waste. And last of all the death of either party, is a determination of the estate.

II. ^b Estates at sufferance are, where the tenant gains possession of lands, by a legal title, and then continues his possession after his

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^g 2 Black. Com. 145. Co. Lit. 55. ^b 2. Black. Com. 150. Co. Lit. 57.

legal title has expired without any title. Thus where a man has a lease for years, or is tenant at will, and holds possession of the lands after the determination of the estate, without any licence from the owner, or any contract made with him, he is called a tenant at sufferance. By the common law of England, such an estate may be destroyed by the entry of the owner, and without such entry he cannot maintain trespass against the tenant at sufferance, as he might against a stranger; for his title having once been lawful, he shall never be called a trespasser till the owner by some public act shall declare his possession to be wrongful. But in this state, who ever holds lands after the determination of his estate, is considered as a trespasser, and as such may be sued and removed out of possession without any previous entry by the owner.

CHAPTER ELEVENTH.

OF ESTATES UPON CONDITION.

ESTATES upon condition, are more properly qualifications of other estates, than a distinct species, as they may be had in several kinds of estate already described.

i An estate upon condition may be defined to be where in the grant of the estate of whatever kind, there is expressed, or annexed some condition or qualification, by which the estate shall commence, be enlarged or defeated, upon the performance, or breach of such condition or qualification. These conditions may be either precedent or subsequent. Conditions precedent, are such as must be fulfilled and complied with before the estate can vest or be enlarged. For instance, if an estate be given to a person upon condition that he marry a certain woman, the condition is precedent and must be performed, before the estate can vest. Conditions subsequent, are such by the failure, or non-performance of which an estate already vested may be defeated. Thus if one grant an estate to another upon condition, that he pay an hundred pounds in one year, the estate is dependent upon the subsequent condition of paying such sum of money, and on failure of performing the condition, the estate will be defeated. So if an estate be granted to

a widow during her widowhood, if she marries, the estate is defeated.

But a material distinction is made between a *condition in deed*, and a *limitation*. When an estate by the words that create it, is so limited, that it cannot endure beyond the time when the contingency happens, on which it is to fail, this is called a limitation. Thus where lands are granted to a person so long as he holds a certain office, or while he remains unmarried, or until the rents amount to a specific sum, these are all limitations, and as soon as the contingencies happen, the several conditional estates cease, and the subsequent estate which depended on such determination, become immediately vested without any act to be done by him who is next in expectancy.

But when an estate is, strictly speaking upon a condition in deed, as where it is granted upon condition to be void upon payment of a certain sum of money, or on failure of paying a certain rent, or so, that the grantee continues unmarried, or provided he goes to York, the law permits it to endure beyond the time when such contingency happen, unless the grantor, or his heirs, or his assigns take advantage of the breach of the condition, and make either an entry or claim in order to avoid the estate. Thus, if a lease be made on condition to be void, if rent be in arrear for a certain time, and that the lessor may re-enter: yet if the rent be in arrear, if the lessor do not re-enter, and the lessee afterwards pays up the rent, and the lessor accepts it, the lease remains valid. Conditions can only be reserved to the feoffor, donor, or lessor, and their heirs, and not to a stranger. Therefore when the words creating an estate, strictly import a condition, yet if on a breach of the condition, the estate be limited over to a third person, the law construes it into a limitation, and not a condition: because it is not in the power of the person, to whom it is limited, to avoid the conditional estate by entry, and it would be in the power of the persons who have no interest in the estate, to preserve or destroy it. So if a man devises estate to his heir at law, on condition that he pays a sum of money, and on failure, devises it over to another; if the heir refuses to pay the money, it shall be considered as a limitation, and the estate shall vest in the other person to

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whom it was devised without entry, because no person but the heir, can by law make the entry.

In all instances of limitations, or conditions subsequent, so long as the conditions remain unbroken, the grantee has an estate of freehold, or for years, according to the nature of the estate that was granted: for while the grantee preserves the conditions on which he holds the estate inviolate, the law contemplates him as holding an absolute estate.

These conditions, if they be impossible at the time when they are made, or become so afterwards by the act of God, or by the act of the grantor himself, or if they are against law, or inconsistent with, or contradictory to the nature of the estate, they are void. If such conditions are precedent, and necessary to be performed before the estate can vest, the grant is void: but if the conditions be subsequent the estate instantly vests in the grantee, as tho no condition had been annexed: For the estate having once vested by the grant, it can never afterwards be defeated by a condition, either impossible, illegal or repugnant.

There are but few instances of conditional estates, excepting where lands are conveyed as pledges, to secure some debt or duty: these are living pledges, and dead pledges, or mortgages.

1. A living pledge, is where a man borrows money of another, and grants him an estate to hold, till the rents and profits repay the sum borrowed. The estate is conditioned to be void, as soon as the sum borrowed shall be raised. The land or pledge is said to be living, because it subsists and survives the debt, and on discharge of it, immediately results back to the borrower. This mode of pledging estates, is rarely used, while mortgages are very common.

2. A dead pledge, or mortgage, is where a person to secure a debt which he owes, or money which he has borrowed, makes to his creditor an absolute conveyance of lands, and annexes a condition, that on paying the sum due, within a limited time, the deed shall be void, but on failure to be absolute. The person executing such conditional deed, is called mortgagor, and the person receiving

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2 Black. Com. 157. Co. Lit. 205. 12 Black. Com. 158.

ing it, mortgagee. The mortgagee immediately becomes vested with the legal title to the estate, defeasible upon performing the condition, by the payment of the money due. He may go into possession of the lands, unless restrained by some special agreement; but is liable to be dispossessed upon the payment of the mortgaged money at the day limited, but the usual practice is to suffer the mortgagor to continue in possession till the time of payment be elapsed. If the money be not paid by the limited time the mortgagee becomes vested with an estate absolute and indefeasible at law. But here equity interposes, and secures to the mortgagor a right to redeem the lands pledged upon payment of what is justly due. This subject however, more properly belongs to that branch of our enquiries, where we treat of the powers of courts of equity. It is sufficient for us in this place to consider mortgages as far as they are regulated by law.—In treating upon equity, we shall resume this subject, and handle it with a minuteness correspondent to its importance.

CHAPTER TWELFTH.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

ESTATES are said to be either in possession, or expectancy.—The former are those about which our enquiries have been principally concerned: for when we were contemplating estates, it was necessary to direct our attention to those which in fact existed, and not to those which are to exist in future. Nothing therefore can be particularly observed upon such estates. This chapter will comprehend estates in expectancy, that will exist in future: which are of two kinds, the one called a remainder, and the other a reversion. This brings us to that part of our disquisitions that relate to the time of the enjoyment of estates.

The laws respecting estates in expectancy, being very abstruse and intricate, and such kind of estates not being very common in this state, it will be unnecessary to enter into a minute discussion of
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the subject : but as this branch of our jurisprudence, is necessary to be known, I shall extract a concise view of it, from the commentaries of judge Blackstone.

I. " An estate in remainder is defined to be an estate limited, to commence and take effect after another particular estate is ended, and determined. Thus, a proprietor in fee conveys lands to one person for twenty years, and after that term expires, to another and his heirs forever, or to one person during life, and then to his heirs forever. Here the first persons to whom these lands are given are tenants for years, or for life, and the remainder is to the other persons, or their heirs in fee.

A person may limit a hundred remainders, or as many as he pleases upon the same estate, but they must be to persons that are in life, or to the immediate heirs of such as are in life, so as to avoid a perpetuity, which the law will not warrant. No remainder can be limited after the grant of an estate in fee-simple, for this comprehends the whole of the estate.

It is a general rule respecting these estates, that there must be some particular estate for life, or for years, precedent to the estate in remainder, in order to support it, and that any thing which defeats the precedent estate, created to support the remainder, will defeat the remainder.

Another general rule is, that the estate in remainder must pass out of the grantor, at the same time that the particular precedent estate is created. Thus an estate granted to one for life, and then to another, and his heirs forever, the estate in the remainder, passes out of the grantor at the same time the estate for life is created, and vests presently in the remainder-man ; tho to be possessed and improved in future, and the remainder-man, may transfer such estate in remainder.

A third rule respecting estates in remainder is, that they must vest in the remainder-man during the particular precedent estate, or at the instant it determines. Thus, if an estate be granted to one person for life, and then to the eldest son of another in fee,

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if the tenant for life die, before the other person has a son born, the remainder is gone, and tho he afterwards have a son, he cannot take by the grant, for the particular estate, that supported the remainder, having ceased before his birth, the remainder falls to the ground, and the estate reverts to the grantor, or his heirs.

On these rules, it is said, that the doctrine of contingent remainders depends. Remainders are either vested, or contingent. Vested remainders, or remainders executed, are where a precedent interest immediately vests, tho to be enjoyed in future, being fixed with certainty, to a determinate person, after the particular estate is ended. Thus if one person be tenant for life, remainder to another in fee, the last man has a vested remainder. Contingent, or executory remainders pass no present interest, and are where the estate in remainder is limited to commence, and vest either in a dubious or uncertain person or upon a dubious, and uncertain event, whereby the precedent estate may happen to be determined, and the remainder be wholly defeated, and never take effect. Thus where a person is tenant for life, with remainder to the eldest son of another person, then unborn, this remainder is contingent, for it is uncertain whether such person will ever be born; but whenever such son is born, the remainder instantly vests, and is no longer a contingent, but a vested remainder: tho if such son should not be born, till after the particular estate is determined, the remainder would be defeated. These remainders must be limited to some persons that may by possibility be in existence before the particular estate ends; for where the possibility is very remote, depending upon two, or more contingencies, the remainder is void.

A remainder is also said to be contingent, where the person is fixed, but the event on which he is to take, is uncertain. Thus where an estate is granted to one for life, and another in fee, in case he survives, the remainder depends on the survivorship, and that failing, the remainder is gone.

Contingent remainders of either kind, if they amount to a freehold estate, cannot be limited upon any particular estate less than a freehold, for unless the freehold passes out of the grantor, when the remainder is created, such freehold remainder is void. The remainder

remainder cannot pass without vesting somewhere, it must vest in the particular tenant, or it can vest no where, unless such tenant have an estate of a freehold nature, it cannot vest in him, and if it does not, a freehold cannot be created.

But a species of estates, similar to these, may be created by will without attending to these rules, by reason of the more liberal construction that is given to wills. Such estates, so created by will, are denominated executory devises. An executory devise is defined to be a disposition of lands by will, where no estate vests at the death of the testator, but is to commence on some future contingency. There is no necessity of any particular precedent estate to support an executory devise. As where a man devises lands to a single woman, and her heirs, to take on the day of her marriage, if the woman be unmarried at the time of the decease of the testator, the estate descends to his lawful heirs in fee, and so continues till the woman be married, and then it vests in her. This limitation of the estate, would be void in a deed, but is good in a will, because, by a devise a freehold estate can pass without delivery of possession, and may commence in future.

An executory devise of an estate in fee-simple, or other less estate may be limited after an estate in fee. A man may devise his whole estate in fee, and then limit a remainder, to take effect on a future contingency. Thus if a man devises his estate to one and his heirs, and if he dies before a certain age, then to another and his heirs, this remainder is good, by way of executory devise, but would be void in a deed. But the contingencies, must be such as will happen in a reasonable time, and not amount to a perpetuity.

By an executory devise, a term for years may be given to one man during life, and a remainder, be limited over to another, which cannot be done by deed, for a life estate being deemed larger than any estate for years, a deed of a life estate is supposed to comprehend the whole term, but in consequence of the liberal construction that is given to wills, a man may in cases of long terms, devise an estate for life and limit a remainder. The Devisee in such cases may limit as many remainders as he pleases, but the persons must all be in esse during the life of the first devisee, for then the candles are all lighted, and are consuming together,
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and the ultimate remainder is in reality only to that remainderman, who happens to survive the rest, or such remainder must be limited to take effect upon such contingency only, as must happen, if at all during the life of the first devisee.

II. Estates in reversion, result from the operation of law, and are defined to be the residue of the estate left in the grantor, to commence in possession, after the determination of some particular estate granted out by him. Thus when a man grants an estate for life, for years, or at will, the reversion continues in the grantor, and instantly takes effect upon the expiration of such estates so granted. For it is an established doctrine of law, that the fee-simple of all lands must abide somewhere, and if he who has the whole carves out a smaller estate, whatever is not granted, remains in him. Estates in fee-tail, on failure of persons to whom they are limited, revert to the donor. Estates in reversion, as well as remainder, are transferable.

It is a general rule of law, that whenever a greater and less estate meet, and unite in the same person, without any intermediate estate, the less is immediately annihilated, and merged or sunk in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to, or is purchased by him, the term of years is merged in the inheritance, and shall exist no more. But where the person holds the estates by different rights, they shall continue distinct and shall not merge. Thus if a person has a freehold in his own right, and a term for years, in another's right, no merger of these estates can take place. But estates in tail, are an exception to this rule; for if a person, who may be called the first donee in tail, should purchase the reversion in fee, of the donor, yet the estate tail shall not merge; because by the statute it was intended, that the first donee should do no act, by which it should be in his power to defeat the estate-tail.

CHAPTER THIRTEENTH.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, CO-PARCENARY, AND COMMON.

THIS chapter considers the number and connexion of the owners of estates.

I. Estates in severalty, are where one person is the sole owner, without any connexion with any other person. This is the most common kind of estates, and it is this we mean, when we speak of estates in general. When we intend any other kind, it is particularly mentioned by way of distinction. Nothing further need be observed on this head. We proceed to a consideration of the other species of estates.

II. " An estate in joint-tenancy, is where lands are granted to two or more persons to hold in fee-simple, fee-tail, for life, for years, or at will. The creation of this estate depends upon the expressions in the deed, or devise, by which the tenants hold, for it results from the acts of the parties, and not from the operation of law. Thus an estate given to a number of persons, without any restrictive, exclusive, or explanatory words, will be construed a joint-tenancy; for every part of the grant can take effect only by considering the estate equal in all, and the union of their names, gives them a union in every respect.

The *proprieties* of this estate arise from its unity, for it is essential that joint-tenants have unity of interest, of title, of time, and of possession. The unity of interest extends to the same period of time, for its duration, and the same quantity of interest, and a difference in either is inconsistent with a joint estate. The unity of title, consists in the estate being created by and derived from one and the same conveyance. The unity of time consists in the estates being created and vested in all at the same period; and the unity of possession, makes it necessary that all should possess at the same time; for they have not a divided possession, one having the possession of one part, and another of a different part, but each has the entire possession of every parcel as well as of the whole, and they are said to be seized *o* by the half or moiety, and by the whole.

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" 2. Black Com 179. Co. Lit. 189. *o* Per mie et per tout.

The *incidents* to joint estates are, that the act of each tenant, in many cases is considered as the act of the whole. A verbal lease, by one, reserving rent to himself, shall enure to the benefit of all. The surrender of a lease to one, that was given by all, shall enure to the benefit of all. Delivery of possession to one, or an entry or re-entry by one, has the same operation, the possession of one, is the possession of all, so as to prevent either from gaining a title by the possession of fifteen years. So if either of the joint-tenants come within the descriptions of the saving clause of the statute, respecting the possession of lands, he saves the estate for all. They cannot sue or be sued without joining or being joined in the suit, in all actions that relate to the joint estate. One joint-tenant, cannot maintain an action of trespass against another, in respect of the land, for each has an equal right to enter upon any part of it. But one joint-tenant, has not the power by himself, to do any act which may defeat the estate of the other, as to lease the land, so as to prevent the other from possessing and improving. If one joint-tenant commit waste which tends to the destruction of the inheritance, no action lies at common law. No action of account lies at common law in favour of one joint-tenant, against another, unless he had constituted him his bailiff and receiver. *p* But now by statute, an action of account lies in favour of one joint-tenant, his executors or administrators, against another, and his executors and administrators, as bailiffs and receivers, to render their reasonable account, for the use and profits of the joint estate, that have been taken, more than their proportion.

In England on the death of either of the joint-tenants, his right remains, and goes to the surviving tenants. But in this state we have never adopted this odious and unjust doctrine of survivorship, but on the decease of one of the joint-tenants, his share descends to his heirs.

These estates may be severed, or destroyed by the act of the parties in making a voluntary partition of the land. By the common law one joint-tenant cannot compel his fellows to make partition, *q* but by statute partition can be enforced by an action, or writ of partition where the partners cannot agree among them-

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p Statutes, 12.

q Ibid. 116.

selves. The death or alienation of one of the tenants sever the joint-estate, and reduce it to a tenancy in common.

III. An estate in coparcenary is where lands of inheritance descend from the ancestor, to two, or more females his daughters, sisters, aunts, cousins, or their representatives in equal shares, there being no male heirs : in such cases they are called co-parceners, or for brevity's sake parceners. This species of estate seems to have been introduced into England on this account. The general law there is, that if there be sons, the eldest shall inherit the whole lands ; but if there be daughters they shall inherit equally, and to distinguish this species of estates they have called female heirs, parceners. But in this state we have not in reality any occasion to make this distinction, for by our laws all male, and female heirs in the same degree inherit alike, and if there be male and female or female heirs only, the statute law has provided for the distribution of the estate by the order of the court of probate. In all cases where lands descend to a number of heirs, such heirs may be considered as joint tenants, or tenants in common till the distribution, of the estate takes place, and in case of a number of female heirs, if they do not proceed to a distribution, pursuant to the statute, they may be called parceners, but have the same essential relation to each other as joint-tenants ; there being only a nominal distinction, as they inherit the estate, and it may vest in them at different periods, but cannot be done in joint-estates.

Parceners have the same unity of interest, title, and possession as joint-tenants. They must sue and be sued jointly in all matters respecting their own lands ; and the entry and possession of one, enures to the benefit of all, in the same manner as in the case of joint-tenants. They cannot maintain actions of trespass or waste against each other. In England the doctrine of survivorship is not admitted, because they are not considered as possessed of an entirety, but a distinct moiety of the estate. At the common law, account will not lie in favor of one parcener against another, but by our statute law this action lies in favor of one parcener, her executors and administrators against another parcener, and her executors and administrators, as bailiffs, and receivers for

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the rents, and profits of the land, where they have received more
than their just proportion.

By the common law, and also by the statute law, parceners may
compel a partition of their estates by action of partition. They
may dissolve the estate by voluntary partition, alienation, or by
vesting the whole in one person, which reduces it to an estate in
severalty.

IV. *f* Estates in common are where several persons hold by
several and distinct titles, but by unity of possession, for the se-
perate estate of each, not being ascertained they must all improve
together. Unity of possession is essential to constitute this estate.
But the quantity of interest, the manner in which the title is deri-
ved, and the time of enjoyment may be totally different, one
may have a freehold interest, another an estate for years, one may
derive his title by descent, and another by purchase, and if there
be a unity of possession, it constitutes an estate in common.

Where an estate by our law descends to a number of heirs in equal
shares, (as is the case in all descents of lands, the owner dying
intestate leaving a number of children,) the heirs have an estate at-
tended with all the properties of a joint-tenancy; for there is
unity of time, interest, title, and possession, but as they derive their
title by descent, which is repugnant to the nature of a joint estate,
they must be considered as tenants in common, and by our law
an estate in common, in such cases, may contain all the unities of
a joint estate.

Estates in common may be created by a dissolution of estates in
joint-tenancy and coparcenary, where the unity of possession is
left. Thus if there be two joint-tenants or parceners, and one
alien his right, the other joint-tenant, or parcener and the alienor
are tenants in common. This destroys that unity which consti-
tutes the former estates, and of course they are changed into estates
in common. Estates in common may be expressly created by deed.
Thus where an estate is given to two, to be holden one moiety by
one, and the other moiety by the other, it is a tenancy in common,
because joint-tenants do not have distinct moieties. A devise to

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two persons to hold jointly and severally, is a joint estate. An estate granted to two persons, to be equally to be holden between them, in deeds, is said to be a joint estate, and in wills a common estate; but the safest method is to declare by express words in the deeds or wills, the kind of estate intended to be created.

By the law of England, the right of survivorship, does not take place in estates in common. By the common law, tenants in common must join in all personal actions, where the profits of the land or some entire indivisible things are in question, as in actions of trespass against strangers: but in all real actions where the realty, or title of the land is concerned, they must bring several actions, as in cases of disseisin—because the possession only is joint, and not the title. If an action be brought by a tenant in common, when all ought to join, the defendant can take advantage only by a plea in abatement. Actions of waste and account do not at common law lie in favour of one tenant in common, against another, but account lies by the statute law. If one tenant in common disseise, or eject another, the tenant so disseised, may have an action of disseisin against the ejector. But then it must be an actual disseisin, as turning him out, and hindering him from entering, and a bare perception of the profits will not be enough.

Estates in common may be dissolved by uniting all the titles and interests in one tenant, by purchase or otherwise, or by voluntary partition. The statute law authorises a compulsory partition by action or writ of partition.

CHAPTER FOURTEENTH.

OF TITLE TO THINGS REAL IN GENERAL.

IN the preceding part of this book, we have considered the nature of things real, the manner of holding them, and the different kinds of estates that may be had in them. We come now to consider the title to things real, with the manner of acquiring and losing it.

The nature of our general title to things was explained in the first chapter of this book. We are now to contemplate the title of individuals to lands in virtue of positive laws. A title may be defined to be a just right, which a certain man has according to the rules of positive law, to enter upon, possess, occupy, and take the benefit of a particular tract of land, in preference to, and in exclusion of the rest of mankind. There are however several degrees in which sundry persons may have a kind of right to lands, which must be considered to form an idea of a compleat title to lands.

* The naked possession, or actual occupation of lands without any color of right, is the lowest degree of title. Such is the case with all disseisors, who by force, or surprise turn the owners out of the possession of their lands, and obtain the possession; or who by any method whatever, obtain the actual occupation of lands, which are owned by other persons. In all these instances, the disseisor has nothing but the naked possession, is a trespasser, and may be removed by the proprietor, at any time within fifteen years: but if he neglect to make his entry, keep up his claim, or bring his action within fifteen years, the disseisor acquires an absolute indefeasible title. Such disseisor may hold possession of the lands against all persons, but the lawful proprietor.

2. *u* While the disseisor has the actual possession of the lands, the disseisor has the *right of possession*, and the *right of property*, between which there is no distinction by our law. The lawful proprietor may at any time within fifteen years, maintain an action of trespass against the disseisor, may enter upon, and take possession of the lands, or may remove him by an action of disseisin, and thus extinguish his possessory title. When the person who has the right of possession and property, obtains the actual possession of the lands, he establishes a compleat title.

3. *w* For by our law to constitute a perfect title to lands, it is essential, that there be a conjunction of the right of possession and property, with the actual possession. When this union is completed, the title is firm, permanent and established, and the proprietor

* 2 Black. Com. 195. *u* Ibid. 196. *w* Ibid. 199.

prietor may dispose of it as he pleases, and may hold, possess and improve, to the exclusion of all the rest of the world.

CHAPTER. FIFTEENTH.

OF TITLE BY DESCENT.

WE have considered the different kinds of estates in things real and the requisites to constitute a general title. We now proceed to a contemplation of the particular titles to lands.

There are but two methods by which a title to real estates can be acquired. *Descent*, where the title results from the operation of law, and *purchase* where the title is acquired by the act and agreement of the parties. This chapter will be devoted to a particular investigation and illustration of the law, respecting the acquisition of property by descent.

* Descent, or hereditary succession, is the title by which a man on the death of his ancestor or other relations acquire his estate by right of representation, as his heir at law. An heir therefore is the person on whom the estate devolves by force of law, on the death of the ancestor : and all such estates thus descending to the heir are called inheritances. To elucidate the doctrine of descent it is necessary to exhibit a concise view of the nature of kindred and the several degrees of consanguinity, or alliance by blood.

Consanguinity is defined to be the relation subsisting between all the different persons, that descend from the same stock or common ancestor. Some portion of the blood of the common ancestor flows into the veins of all his descendants, and tho mixed with the blood flowing from a thousand other families, yet it constitutes the kindred or alliance by blood, between each individual, this relation by blood has two divisions. Lineal consanguinity, and collateral, or transversal consanguinity. We shall first explain lineal consanguinity. This is that relation which exists between persons where one is descended from the other, as between the son, the father, the grandfather, the great-grandfather, and so upwards in a direct ascending line, or between the father, the son, the grandson, the great-grandson, and so downwards in a direct descending line.

Every

* 2 Black. 200. Co. Lit.

Every generation in this direct course, makes a degree of consanguinity, computing either in the ascending or descending line.— This being the natural method of computing the degrees of lineal consanguinity, it has been adopted by the canon, the imperial, and the common law.

y It is remarked by judge Blackstone in his commentaries on the laws of England, to be astonishing to consider the number of lineal ancestors, which a man has in a few degrees, and that he is said to contain as many bloods in his veins, as he has lineal ancestors; that he has two in the first degree, his own parents, four in the second, his grand parents, eight in the third, his great-grand-parents, and so on, doubling the number at every degree, which by the rule of geometrical progression, demonstrates, that there are a thousand and twenty-four lineal ancestors, in the tenth degree, and more than a million in the twentieth. To pursue this calculation upon the same principles, through as many generations as have passed away since the creation of the *first pair*, would extend the number of our lineal ancestors infinitely beyond all human conception. But we have the authority of revelation to assure us, that in the origin of the world, one pair only was created, and that from them has sprung the whole race of mankind. We must therefore, in making our calculations upon these principles, take into consideration the circumstance, that in some stage of our calculation, we must begin to lessen our number of lineal ancestors, for the purpose of uniting in our descent from the original parent of the human race. The slightest observation will shew, that there is a constant intermarriage between relations in degrees not very remote, by which the number of lineal ancestors are diminished, in a manner not capable of calculation. So that a whole country in tracing their progress through a few ages, will find, they all descended originally from a few families. America furnishes a most illustrious example, to demonstrate this fact. From a few thousand persons, who first emigrated into this country, a wide extended continent has been peopled in less than two centuries.— Much the greatest part of the inhabitants now living in the United States, must trace their lineal ancestry through the first emigrants.

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The rule of geometrical progression, would be mathematically true, if there were no intermarriages between relations in any, even the remotest degrees ; but when we consider the constant intermarriage of relations, which necessarily took place for the original propagation of the human race, and which must now take place for their preservation, it is evident that this rule in no measure, ascertains the actual number of our lineal ancestors, even in degrees not very remote, and that it is wide of the truth, to say, that a man has as many different bloods in his veins, as he has lineal ancestors, by the rule of geometrical progression, as adopted by Blackstone.

Collateral, or transversal consanguinity, is a relation subsisting between persons that descend from the same common ancestor, but not from each other. It is essential to constitute this relation, that they all spring from the same common root or stock, but in different branches. Thus if John Stiles have two sons, and they both have issue the children of both are lineally descended from John Stiles, as their common ancestor, but they are related to each other by collateral consanguinity, because they have not descended lineally from each other, but collaterally from the same common ancestor.

From this representation of transversal kindred, it is very easy to conceive, that from each ancestor which a person has, there is issuing a race of collateral kinsmen, and that the number of them in the various degrees in which they stand related, must be beyond all conception.

Hereditary succession among collateral relations, is the most difficult to be ascertained. It is therefore necessary to illustrate the mode by which the degrees in this kind of consanguinity are computed. The method adopted by the canon law and the common law of England is this. Having discovered the common ancestor, to begin with him, and reckon downwards, and the degree the two persons, or most remote of them is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them, there is but one degree. An uncle and nephew,
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are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor, and the same rule of computation is extended to the remotest degrees of collateral relations.

The method adopted by the civil, or imperial law, is this, to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person, calling it a degree from each person, both ascending and descending, and the number of degrees they are distant from each other, is the degree in which they stand related. Thus from a nephew to his father, is one degree, to the grand-father, two degrees, and then to the uncle three, which points out their relationship. Thus if John Stiles's two sons have each a son, they are related to each other in the fourth degree : for we must compute from one of the grandsons to the father, then to the grand father, then descend to the father of the other, and then to him, which makes four degrees : but according to the other method, they are related in the second degree.

It is however immaterial which mode of computation is adopted, for both will establish the same person to be the heir. As the imperial mode points out the actual distance between the persons in question, and as our estates descend nearly according to the Roman law, there seems to be a propriety in making our computations according to that mode. Nor is it probable, that the mode according to the canon law had ever been introduced, had it not been calculated to answer an important purpose for the canonists. The prohibition of marriage originally extended to the third degree of consanguinity, according to the imperial mode of computation. The profits of granting dispensations to persons to marry within the prohibited degrees, was an object to the papal power, and the introduction of the mode of computation by the canon law, which extends the prohibition to the sixth degree, comprehended many more subjects for dispensation, than the mode before adopted, and poured a rich stream of wealth into the treasury of God's vicegerent.

Having

Having thus concisely explained the nature of consanguinity and the mode of ascertaining the degrees of kindred, I proceed to lay down the rules by which the succession to estates is determined. The rules of descent are established by the statute concerning testate and intestate estates. An explanation and illustration of the principles contained in this statute, and the consequences resulting from them, is all that is necessary to complete this branch of our enquiries.

I. The first general rule is, that estates of inheritance where the proprietor dies intestate, leaving children, shall descend to them all, in equal shares, whether sons or daughters.

A posthumous child, or one born after the death of the intestate, will take with the other children ; for the estate will vest in the child in the mother's womb, or as the law calls it, in ventre sa mere.

This comprehends all estates to which the intestate had the right of possession, as well as the right, and actual possession : but an exception is made to the general rule, where any of the children have had any estate by way of settlement, from the intestate in his life time, equal to the shares of the other children : but if the estate advanced by settlement be not equal to the shares of the rest, then such proportion shall be allowed them, as will make all their shares equal. The widow of the intestate, if he leaves any, is entitled by way of dower, unless endowed before marriage, to the use, and improvement of one third part of the real estate during her life ; and at her decease, the same is to be divided in the same manner as the rest of the estate, if it be undivided at that time.

As the statute respecting descents comprehends real, as well as personal estate, there is a provision that in the distribution of the estate, that the male heirs shall have their parts in real estate as far as the estate will allow. So where a division of an estate in houses and lands will be of great prejudice and inconvenience, the court of probate may direct that the eldest, or on his refusal either of the rest, if they consent, may take the whole at the appraisal of indifferent men, under oath, and pay, or secure to each, their proportion in a reasonable time.

This rule is very different from the English law, where the eldest son only inherits, and the daughters never, unless there be a failure of males. This feudal idea respecting descents, was disregarded by our ancestors, when they formed their code of laws: but their reverence for the bible, and probably some prejudice remaining in favor of the principle of keeping up families, by aggrandizing the eldest son, induced them to copy from the law of Moses, that regulation which confers on the eldest son a double portion. But this principle appears manifestly unwarrantable, when it is considered that all the children of the intestate have by nature equal claims upon his estate, without distinction of age or sex, and that there is no particular necessity existing, which requires that the eldest son should have a larger portion of the estate of the father, than the youngest. In the year 1792, this part of the law was repealed, and all the children placed upon the same footing.

II. The second general rule is, that where any, or all of the children are dead, the estate shall descend to their legal representatives. If one son be dead, leaving two or more children, they shall stand in the place of their father, and by the right of representation, inherit that portion of the estate to which he would have been entitled had he been living. If all the children be dead, each leaving a number of children, the children of each, being the grand-children of the intestate, shall represent their respective parents, and inherit their portions. The estate therefore must be divided into as many equal shares, as the intestate left children, and the issue of each child will take that portion, which would have belonged to him, had he been living, to be divided equally among them. If each child should leave a different number of children, yet the branches of each stock, the children of each child, take what would have been the share of the parent, and the estate is not to be equally divided among all the grand-children, without any reference to their parents. In the last case, suppose one of the grand-children dies before the intestate, leaving issue, such issue will stand in the place of the parent, and be entitled to his share.

This inheriting by the right of representation, is also called a succession *per stirpes*, according to the roots, because all the branches

heirs inherit the same share, that their root whom they represent would have done. Thus in the last mentioned case, all the grandchildren of each particular child, being the branches, are entitled to receive the same portion of the estate, which their parents, being the roots, would have done had they been living. If the estate should be divided equally among all the grand-children, without any reference to the stock, from whence they sprung, it would be a succession *per capita*, according to the heads. It is a general rule that the lineal descendants of any person deceased, shall represent their ancestor in infinitum, and stand in the same place as he would have done had he been living. The right of representation continues without limitation in the descending line, and the inheritance descends *in stirpes* according to the roots. If one of three sons die, leaving six children, and then the father die, the two surviving children will take each one third part of the estate, and the other third part will remain to the six grand-children.

III. The third general rule is, that on failure of children, or lineal descendants of the intestate, the inheritance, if derived by descent, gift, or devise, from the parent, ancestor, or other kindred of the intestate, shall descend in equal shares to his brothers and sisters, and those who legally represent them, of the blood of the person or ancestor from whom such estate came or descended.

We now are to consider the descent of lands among collateral relations. The law has pointed out two modes, of collateral descent, according to the different modes, by which lands can be acquired. We are first to consider the descent of lands, that were derived to the intestate from some of his kindred, by descent, gift or devise. In all these instances the person receiving the estate pays no consideration, it is in the nature of a gift, and therefore on failure of his lineal heirs, it appears to be consonant to the principles of equity, that the lands should go to those persons who are of the blood of the relation, from whom they came. It is a fundamental doctrine of the common law of England, that in collateral descents the lands shall go to the relations of the blood of the first purchaser, who is the person from whom the lands are supposed

originally to have descended. On this principle our law has made a distinction in the mode of the descent of lands, that came to a person by descent, gift, or devise, from some kindred; and that are acquired by actual purchase, or by devise, or gift from some stranger; and has adopted the doctrine that lands acquired in the manner now under consideration, shall go to the nearest relations, of the blood of the kindred from whom they were derived. In the application of this general rule, we shall find that in all instances the brothers and sisters of the whole blood of the intestate, shall inherit his estate, that in some instances brothers and sisters of the whole and half blood, will inherit together; that in some instances brothers and sisters of the half blood, will inherit, and in some be excluded, and the estate go to a remote relation in preference to them. Brothers of the whole blood, are where they descend from the same couple of parents; of the half blood, where they have the same father, and two mothers, or the same mother and two fathers. So a kinsman of the whole blood, must be derived not only from the same ancestor, but the same couple of ancestors; but a kinsman of the half blood in the degrees, beyond brothers, is where one of the ancestors in some stage was the same, and the other was not.

All brethren of the whole blood of the intestate, will necessarily be of the whole blood of the relation, from whom the lands came. But suppose John Stiles has four sons, two by a first, and two by a second marriage, and dies, leaving an estate which descended in equal shares to them. If either of the four sons die without issue, the estate which descended from his father, would be equally divided among the surviving brothers of the half as well as the whole blood, because they are all of the blood of the father, from whom the land was derived. But if two of the brothers, by one marriage, should inherit an estate from their mother, and one of them die without issue, then the other brother of the whole blood, only would inherit, because the half blood would not be related to the person, from whom the land came. If the two brothers by one marriage should die without issue, leaving maternal estate, the half brothers could not inherit; but the estate must go to the nearest

nearest maternal relations. If lands should descend, be given or devised to either of the four brothers from a paternal uncle, or any paternal relation, and either die without issue, the land descends equal to his brothers of the whole and half blood : if lands should be thus derived from a maternal uncle, or any maternal relation and either die without issue, his share must go to the uterine brother, or brother of the whole blood, and never to the brother by the father's side. In case of the death of any brother or sister leaving issue, their children shall by the right of representation stand in their stead, and be entitled to their shares. But the right of representation, among collateral heirs, extend no further than the children of brothers and sisters.

IV. The fourth general rule is, that on failure of brothers, or sisters, and their legal representatives, the estate derived to the intestate by descent, gift, or devise from some relation, shall descend to the nearest of kin to the intestate, and of the blood of the ancestor or person from whom it was derived.

The reason of this distinction, respecting descents in our law, seems to be this, that where estates have been derived from some kindred, the heirs of the person from whom they came, have the best title to the reversion, in case of the failure of lineal descendants or brethren of the intestate, and therefore the estate shall descend to them, and not to the general heirs of the intestate, which might carry the estate wholly out of the families from whence it came.

In explanation of this rule, it is only necessary to observe, that we must ascertain the relation from whom the estate came, whether it be father, uncle, cousin, paternal or maternal relation, and then the nearest of kin to the intestate of the blood of such relation, by the mode of computing the degrees heretofore pointed out, is the heir. If no person of the blood of the relation from whom the estate came, can be found, it will not go to any other kindred of the intestate, but will escheat for want of legal heirs. When the stock from whence the degrees of consanguinity are to be computed, is ascertained, the same method is adopted, as in the rules hereafter mentioned, in which this subject will be fully considered. The
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donor can never inherit the estate given by him, if living at the death of the donee, but his parents may in the same manner, as in the cases hereafter mentioned, for the expression of the blood of such person, excludes the person himself.

V. The fifth rule is, that on failure of lineal descendants, the estate acquired by actual purchase, or by the gift or devise of some person, not of kin to the intestate, shall descend in equal shares to his brothers and sisters of the whole blood, and those who legally represent them. But no representatives are admitted among collaterals, after brothers and sisters children. If the intestate, left three brothers they would all inherit equally, if one of the brothers should die before the intestate, leaving children, they would represent their father, and take his share. If all the brothers had died before the intestate, each leaving a different number of children, the succession would be per stirpes, or by the roots, which was adjudged in the following case. *a* A person devised a certain portion of his estate, to be divided among his relations, according to the laws of the state of Connecticut, he had five brothers and sisters, who all died previously to the making of the will, each leaving a different number of children. The children of that brother who left the greatest number, claimed a division of the estate per capita, or according to the numbers, that is, share and share alike : that instead of dividing the estate into five equal parts, which was the number of the brothers and sisters of the testator, and distributing each share to the children of the several brothers and sisters, that the estate should be equally divided, among all the children of the brothers and sisters of the intestate, without any regard to the branches of the families. They founded their claim upon the expression in the statute, that on default of parent, brother; or sister, the estate should go equally to the next of kin of the intestate in equal degree, without saying any thing concerning a want of legal representatives ; that there was a failure of the persons described in the statute, that all the children of the brothers and sisters were next of kin in equal degree ; that therefore, they were the persons pointed out by the statute and the will, and ought to share the estate per capita, by heads, that is, share and share alike.—

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a Kennedy vs. Kennedy, S. C. 1786.

On the other side, it was contended that the statute on failure of lineal heirs, directed the estate to descend to the brothers and sisters of the intestate, and their legal representatives; that the children of the five brothers and sisters, represented them and stood in their places, and were entitled to the same shares they would have been, had they been living, and of course, that the succession ought to be by the roots. The court determined, that the distribution of the estate should be by the roots. The only doubt that could be, respecting the construction of the statute, arose from the omission of the words, *legal representatives*, after the words, if their be no parents, brother, or sister, which must be intended and understood to make the statute consistent, and this may be fairly done, for in the former part of the statute, on failure of lineal heirs the estate is to go to the brothers and sisters and their legal representatives.— This is a positive direction, and it will not do to say, that because in making provision for the disposition of estate among remote collateral heirs, there is an omission of mentioning the failure of certain relations already provided for, that therefore the last part of the statute shall repeal the former and prevent the estate from descending to them. It cannot be proper to say, that because the words, *legal representatives*, were not added after parents, brother, or sister, that therefore, the estate should not descend to the legal representatives of brothers and sisters, by the roots, as the statute had before provided. Indeed the statute in making provision for the descent of estates, to the various degrees of kindred, must in every advance, suppose a failure of the heirs to whom the estate had previously been directed to descend. To admit a different construction, and take away the right of representation, would be to allow the uncles of the intestate to inherit with the nephews, and nieces, because they are all in equal degree.

This decision is opposed to the whole current of British authorities in the construction of the statute of Charles II. for the distribution of personal estate, and from which, this part of our statute is literally copied. ^b The principle which they have adopted is, that where there are several brothers and sisters, and some of them are dead, leaving children, then such children by right of representation, shall stand in the place of their parents, and inherit with

^b 1 P. Will. 595. 2 Ibid. 50. 2 Vez. 213. 1 Atk. 454, 455.

with their uncles, such part of the estate of the intestate, as their parents would have been entitled to, per stirpes : but if all the brothers and sisters of the intestate are dead at the time of his death, leaving children, that the right of representation does not operate, and such children do not inherit in right of their parents, but as next of kin : in consequence of which, all being in the same degree of kindred, they take equal shares per capita, according to the numbers : and if there are any uncles or aunts alive, they being in the same degree, with the nephews and nieces, they will take equal shares. But if one of the brothers or sisters had been living, then the right of representation might have operated.

The decision of our courts is as correct, and a more just, and equitable construction of the statute, than that of the British courts. The statute intended particularly to mark brothers and sisters, and their legal representatives, as a branch of relations, who were to inherit by force of positive law, and not merely as next of kin.—The estate is therefore given to them collectively. If all the brothers and sisters are alive, they can have no representatives. If any are dead, their children stand in their place and represent them, if all the brothers and sisters are dead, then the estate is given to their children as representatives, by force of which they are to take as standing in the place of their parents, and not by proximity of blood. I can see no reason why, on the death of all the brothers and sisters, their children cannot represent their parents, and take their shares, as well as they can, when only part are dead. The children of the deceased brothers and sisters, are their representatives whether all or part of the brothers and sisters are dead, and it is by the description of legal representatives, that they are to take the estate : and upon legal principles, the grand children might have been admitted by right of representation, had not this been expressly taken away by the statute. I know not by what principle of common sense, or rule of logic, it can be said, that children do not represent their parents, unless some of their uncles are alive. If it is equitable that the children of deceased brothers and sisters, should by right of representation stand in place of their parents, and share the estate of their deceased uncle with their surviving uncles, to the exclusion of the uncles of the intestate, is it not equally right, that

that in case all the brothers and sisters of the intestate are dead leaving children, that such children by right of representation, should take the estate of the intestate, to the exclusion of the uncles to the intestate ?

VI. The sixth general rule is, that on failure of lineal heirs and brothers and sisters, and their legal representatives, the estate acquired by actual purchase or by gift, or devise, from some person not of kin to the intestate, shall go to his parent or parents.

This rule of descent, is warranted by the ideas of mankind on the subject. We feel that there is justice and propriety in giving the estate of a child, dying without issue, and leaving no brethren, to the parents, who have had the care, trouble and expense of his support, in preference to some remote branch of the family, who never have performed such services for the intestate, and probably had no more connexion with him, than with utter strangers. The opposite doctrine of the English law, that estates never should ascend, has ever been complained of as a hardship, and injustice ; and it is a pleasing prospect to observe, that our country has risen superior to the prejudices which are usually entertained in favour of long established institutions, however impolitic, and have adopted rules which are founded in the principles of justice, and the maxims of good policy.

If the father, and mother be living, the estate will ascend to them and they will take as joint-tenants. If either be dead, the survivor will take the whole.

VII. The seventh rule is, that where there are no lineal descendants or brothers and sisters, or their legal representatives of the whole blood, or parents, then the estate acquired as mentioned in the last rule, shall descend to the brothers and sisters of the intestate of the half blood, and their legal representatives.

By the English law, estates descend to collateral relations, in the remotest degree, in preference to the brother of the half blood. The hardship and injustice of this regulation, has been the subject of much censure and disapprobation, and Blackstone, whose partiality for the English law is very great, cannot justify it, even upon

feudal principles. It is much more natural and easy, for legislators who are framing new systems, to avoid the errors that have been interwoven into preceeding systems, than it is to correct old errors which have grown venerable by the lapse of time. The English Parliament have no idea of mending this defect in their code of laws, while we have prudently avoided the introduction of it into our own.

There need nothing more be remarked for the explanation of this rule. It must be observed, that in the statute the words, *and those who legally represent them*—instead of being placed next after the clause, directing the estate to descend to the brothers and sisters of the half blood of the intestate, were by a mistake in the printing, placed next after the clause directing the estate on failure of parents, brothers and sisters, to descend to the next of kin to the intestate in equal degree. This mistake is extremely evident : it is apparent from the general tenor of the statute, that it was intended that the representative of the brethren of the half blood, should inherit as well as of the whole blood, and it is expressly determined by the statute, that the right of representation shall be taken away after brothers and sisters children, and yet at the same time the statute direct, that the estate shall go to the legal representatives of the next of kin, on failure of parents, brothers, and sisters. This is a manifest contradiction in the statute : but all is reconcileable upon placing the words, *and those who legally represent them* in the manner above mentioned, next after brethren of the half blood.

VIII. The eighth and last general rule is, that on failure of lineal descendants, brothers and sisters of the whole and half blood, and their legal representatives, representation among collaterals, being excluded after brothers and sisters children, and parents, then the estate acquired by actual purchase, or by gift or devise, from some person not of kin to the intestate, shall descend in equal shares, to the next of kin to the intestate, in equal degree, with this restriction, that kindred of the whole blood, shall take in preference to kindred of the half blood in equal degree, and with the exclusion of the right of representation.

When we come to the application of this rule, it is to be remarked

ked that the parents of the intestate, his brothers and sisters of the whole and half blood, and their children, (representation among collaterals being no further admitted,) are dead. We then are to search for the next of kin, in more distant and collateral degrees. It is possible that his brothers and sisters may be dead, and all their children, but there may be grand children of his brothers and sisters, who are great nephews and neices, to the intestate, and related to him in the fourth degree. But if the intestate had grand parents, they are in the second degree, and will next inherit. If he had any uncles or aunts who survived him, or great grand parents, they are nearer of kin than great nephews, and neices, being in the third degree of consanguinity, and of course will inherit in preference to them. If there be uncles of the whole and half blood, the uncles of the whole blood only will inherit, for the rule is, that among kindred in the same degree, the whole shall be preferred to the half blood; but if the uncles of the whole blood are dead, leaving children, the uncles of the half blood, shall inherit in preference to them; because in collateral descent, the half blood in a nearer degree is always preferred to the whole blood in a remoter degree. If some of the uncles are living and some dead, leaving children, they cannot represent their father, and take his share of the estate, for in this stage of collateral descents, the right of representation is taken away, and the whole estate will go to the surviving uncles.

If all the uncles, and aunts of the intestate are dead; leaving children, they will stand related to him in the fourth degree; and if he has great nephews and neices, they being in the same degree, they will all inherit together, by the heads, or per capita, and take his estate in equal shares. If there be any great uncles and aunts alive, they are in the fourth degree also, and will inherit equally with them.

This doctrine of our law of descents which excludes great nephews, and nieces, or the grand children of brothers and sisters from standing in the place of their parents, and inheriting the estate of their great uncles, by the right of representation, and which of course gives a preference to the uncle of the intestate, and equal shares to cousins, appears to me not founded in the principles

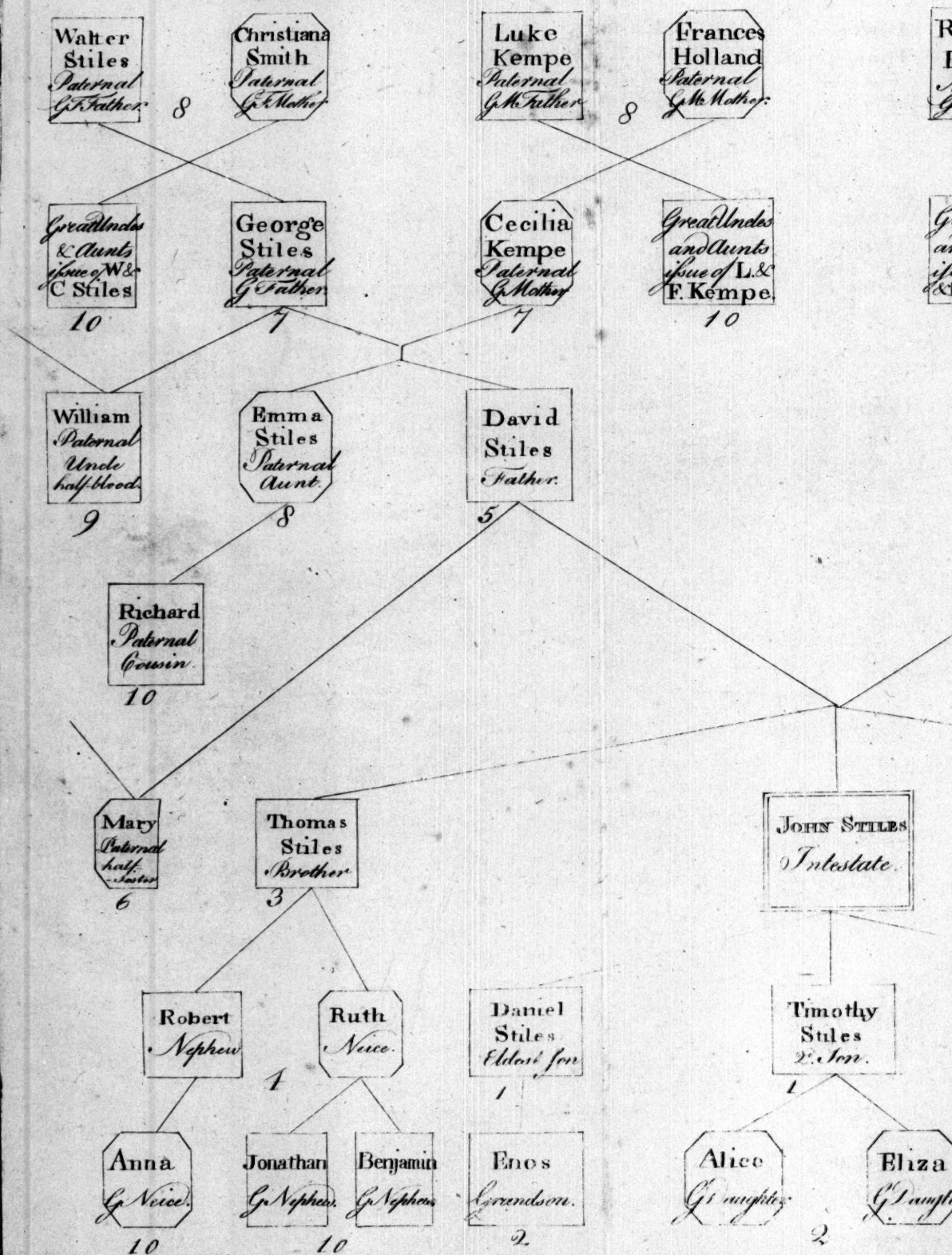
principles of nature, or conformable to the dictates of justice, and policy. The descendants of a brother or sister, tho more remote in degree, yet as they proceed from a nearer stock than uncles, will always be considered in a more peculiar sense, to belong to one's family, and will claim a larger share of affection and attachment: and I will appeal to the heart of every man, whether in case of dying intestate, he would not chuse that his estate should descend to the grand children of a brother or sister in preference to its going to an uncle or an aunt, or being equally divided with cousins. The law therefore, instead of taking away the right of representation after the children of the brothers and sisters of the intestate, ought to take it away after the descendants of brothers and sisters. This would adopt a rule consonant to the principles of equity, and the dictates of affection, that in the first place, the lineal descendants, must be exhausted, and all the collateral descendants flowing from the father of the intestate, which peculiarly constitute his family, before we advance to a more remote stock, from whence we derive branches that can inherit. But a commentator on the laws, must take the laws as he finds them,

By the English law the male branch of the family, is always preferred to the female, and recourse is never had to the female, till the male branch has become extinct. But our law makes no distinction in the right of succession, between the male, and female branch: and as the statute says generally, that the estate must go to all who are next of kin in equal degree, we must take the male, and female branches of families, hand in hand.

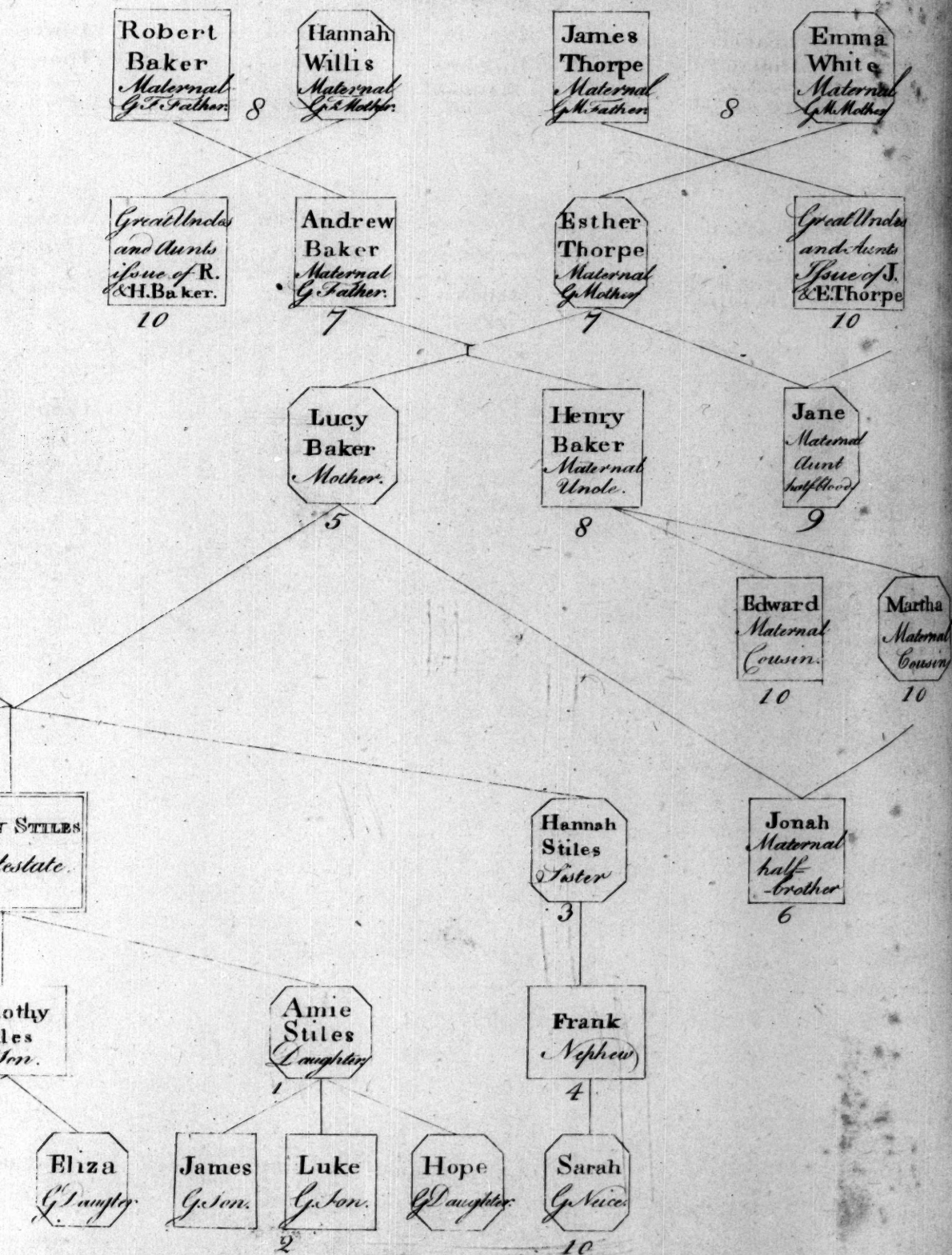
We have already traced the descent of estates to the fourth degree, comprehending great uncles, cousins, and great nephews, and nieces. On this extinction we must take a wider range, and all who are in the fifth degree to the intestate, will inherit in equal shares: and then on their extinction to the sixth degree, and in like manner till the heir be discovered. In this manner we might ascend, if it were possible for human beings to know all their kindred, from one stage of families to another, thro' all the successive ages, that have rolled away since the creation of man, for the purpose of discovering all the streams of inheritable blood, by
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OF DESCENTS. *Maternal Line.*



which the degrees of propinquity among the sons of men may be ascertained. In this progressive research, every man must find persons that might inherit his estate; for all the nations of the earth are related together. But to ascertain the degrees of consanguinity between all the inhabitants of the globe, would be a labour that omniscience only could accomplish. Men in a few generations lose the knowledge of their remote kindred, and estates sometimes elude, from the impossibility of ascertaining the persons, who are the legal heirs.

I shall next exemplify these rules by the Table of Descents. John Stiles the intestate and proprietor of the lands in question is the propositus, or the stock from whence the degrees of kindred are to be computed. In the first place, Daniel, Timothy, and Amie his sons, and daughter succeed him. (No 1.) If Timothy be dead, his two daughters, (No 2.) Alice and Elizabeth will share by the right of representation, one third of the estate with Daniel and Amie. If all the children be dead, then the grand children will inherit the whole estate, by the root, that is, Enos the son of Daniel will take one third, Alice and Elizabeth the daughters of Timothy, take one third, and James, Luke, and Hope, the children of Amie, take the other third. (No 2.) If Enos should be dead leaving a son, by the right of representation he could stand in the place of his grand father Daniel, and take one third. If there be no lineal descendants, then Thomas Stiles the brother, and Hannah Stiles the sister of John Stiles, of the whole blood will succeed. (No 3.) But if either be dead, their children will succeed by right of representation. So if both be dead their children will succeed, being the nephews, and nieces of John Stiles, and will take the estate by roots. (No 4.) If there be no nephews, or nieces, who are children of the brother and sister of the whole blood, then the estate will ascend to David Stiles the father, and Lucy Barker the mother if both are living, as joint-tenants, if either be dead to the survivor. (No 5.) If they are dead then to the half brothers and sisters of John Stiles, (No 6.) and their legal representatives, subject to the same restriction, as in cases of the whole blood. If they are dead then the estate will ascend to all the paternal, and maternal grand parents, who are in
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the second degree. (No 7.) If they are dead, the estate will go to those who are related in the third degree. There are great grand parents, uncles, and aunts, of the whole blood: (No 8.) but if they are dead, then to the uncles, and aunts by the half blood. (No 9.) If they are dead, then to great uncles, and aunts, cousins, and great nephews and nieces, who are in the fourth degree. (No 10.) Here it must be understood, that all the collateral heirs where there are several, take per capita, or by the heads, and that if there is one only in any degree, he will take the whole estate. If these relations are all dead, then the estate will descend to those who are in the fifth degree of kindred; who are great great uncles, and aunts, the children of great uncles, of cousins, of great nephews, and nieces. On the extinction of relations in the fifth degree, we must proceed to the sixth, and so in succession till we find the heir. In passing from one degree to another more remote in collateral kindred, we must in order to find all the persons who stand in the same relation, not only descend one degree lower among the several stocks, or families, which have before been pursued for heirs but we must also ascend one stock, or grade higher: because equal degrees of kindred may be found in both directions, and tho one stock may be more remote than another, yet the proximity to it may make the degree of kindred the same. Thus the children of great great uncles, the grand children of great uncles, and the grand children of cousins, are all in the same degree of relation, tho not equally distant from the stock, in the course of lineal ascent. Every new stock to which we ascend multiplies the chance of discovering heirs, because it encreases the stock from which branches may issue, in proportion to the increase of lineal ancestors.

If the land was received by descent, gift, or devise from some ancestor, or kindred of the intestate, then on extinction of lineal heirs, to be discovered as has been mentioned, and of brothers, and sisters of the blood of the person from whom the land came, we must for the purpose of finding the other collateral heirs, take the person from whom the estate came, and consider him as the *propositus*, in the same manner we did John Stiles; and then all
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the collateral heirs of such person, will be the collateral heirs of the intestate, of the blood of the person from whom the land came, and the estate by law will descend to such person among them, as is of nearest kin to the intestate.

Such is our law of descents, but before I close this subject, let us compare it with the English, and Imperial codes, the most celebrated that have ever been established. The rules of the English law are,—1. That inheritances shall lineally descend to the issue of the persons last seised in infinitum, but shall never lineally ascend. 2. That the male issue shall always be admitted before the female. 3. That where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether. 4. That lineal descendants in infinitum shall always represent their ancestor and stand in the same place he would have done, had he been living. 5 That on failure of lineal descendants, the inheritance shall descend to the blood of the first purchaser, subject to the preceding rules. 6. That the collateral heir of the person last seised, must be his next collateral kinsman of the whole blood. 7. That in all collateral inheritances, the males stock, shall be preferred to the female, unless where the lands have in fact descended from a female. The rules of the Imperial law as promulgated by the Emperor Justinian are, 1. That all the lineal descendants of the intestate, whether male, or female, and their legal representatives shall inherit his estate in equal shares. 2. That where there are no lineal descendants, then the ascendants, as parents and grand parents, are preferred to all collaterals except brothers, and sisters, of the whole blood; but if there be no such brothers and sisters, then all the ascendants in the nearest degree shall inherit in preference to remoter degrees, whether male or female, paternal, or maternal; and if several degrees concur, the inheritance must be equally divided between the paternal, and maternal ascendants. 3. If there be brothers and sisters of the whole blood, they shall be considered as the nearest ascendants and the estate shall be equally divided among the brothers, and sisters, and the ascendants, according to the number of persons. 4. If the intestate leave neither descendants, nor ascendants, then the estate shall be equally divided among the brothers and sisters of the whole blood, and

Justinian Nov. CXVIII Chapters 1, 2, 3.

and their children by the right of representation. 5. On failure of brethren of the whole blood, and their children, brothers of the half blood shall inherit. 6. The right of representation among collaterals, is allowed no further than to brothers and sisters children. 7. Where there are no descendants, ascendants, brothers, or sisters, or brothers or sisters children, the estate descends to all collaterals in equal shares that are of nearest kin to the intestate, in equal degrees.

Tho our law of descents, bears a great resemblance to the Imperial law, yet it may justly be deemed a great improvement upon it : but when we compare it to the English law, which is of feudal origin, the superiority is very manifest : and we may venture to assert that it is the most liberal, and equitable system of hereditary succession, that ever was adopted, and the most consonant to the laws of nature. The odious and unjust doctrine of primogeniture, so well calculated to aggrandize the families and support the pride of feudal aristocracy, is wholly exploded. Parents may inherit the estate of their intestate sons, when it was acquired by purchase or by gift, or devise from a stranger ; and brothers of the half blood shall not be excluded by collateral kinsmen in remote degrees. The female sex are placed upon the same footing with the other sex, in respect of their succession to property.

CHAPTER SIXTEENTH.

OF TITLE BY DEED.

IN the preceeding chapter, we explained, and illustrated the rules of descent according to our law. We next come to contemplate the various modes of acquiring titles to real estates by purchase.

^d Purchase in its most extended legal signification, comprehends every method by which real property can be acquired, excepting descent ; and is said to be the acquisition of a title by a man's own act, and agreement, and not by the mere operation of law. The distinction

^d Co. Litt. 18. 2 Black Com. 241.

distinction between a title acquired by purchase and by descent, is very apparent. The latter must be an estate coming from some ancestor, and vesting in the heir, according to certain rules established by law. But where a proprietor in fee devises his estate to his heirs at law, to hold in the same manner and proportion, as if no devise had been made, they shall be considered as taking by descent. Purchase is where the title is obtained in some manner different from descent. Thus a title obtained by the levy of an execution, by devise, or possession is as much a title by purchase as where the full consideration is paid in money, and a deed of bargain and sale executed. So are mere gifts for the consideration of love and good will, or blood and affection.

The difference between estates acquired by purchase and descent are, that the heirs who have received estates from their ancestors, are obliged to fulfil his covenants and contracts, to the value of the estate that descended to them. By the English law, an action on a contract, such as a bond, which binds the heirs, may be maintained against the heirs, as well as executors—but by our law no action for a debt will lie against the heir, tho bound by the covenant, but against the executors or administrators only; for all the debts of the deceased are discharged, before a distribution to the heirs: and for that purpose, the real as well as personal estate may be applied by the executor or administrator. But on covenants of seisin and warranty, where the breach may happen after the death of the covenantor, and settlement of the estate, action will lie against the heirs, as in case of eviction, and they will be liable to the amount of the estate received by descent.

There are seven ways of acquiring titles to real estate by purchase, which are, by deed, by devise, by execution, by possession, by escheat, by forfeiture, and by accession, and of these we shall treat in their order.

The acquisition of real estates by deed, is the most universal method in practice, and corresponds to the common ideas of purchase in its limited sense. This is also called alienation, and denotes the transmission of estates from one proprietor to another, by a volun-

tary conveyance, upon a mutual contract, for a valuable consideration. The idea of a voluntary agreement in both parties, attends the alienation of estates, and where such agreement cannot be supposed, the conveyance cannot be called an alienation : but in common language, we make use of the words, purchase, or bargain and sell, and rarely of the word alienation.

In treating of deeds, we shall first point out their general nature, and then the several kinds. A deed is defined to be a writing, signed, sealed and delivered by the parties, containing a contract or agreement between them for the sale of lands. For a compleat illustration of this subject, it is necessary to attend to the several requisites to constitute a deed ; and then to the manner how such deed may be defeated or destroyed.

1. A deed must contain in legal and proper order, sufficient words to evidence the intention and agreement of the parties, to render it obligatory. There is however no particular form, that is absolutely necessary to constitute a deed, nor need all the parts which commonly compose a deed be used, provided there be sufficient words to express with clearness and certainty, the meaning of the parties. There is however a particular form, which has been adopted, and practised upon in this state, which conveys the meaning of the parties in the clearest and most effectual manner with the greatest simplicity and conciseness ; which has been confirmed, by immemorial usage, and sanctioned by the wisdom of ages. It is therefore the safest method in conveyances, to make use of this established form, and not risque the decision of courts upon the legality of any new fangled modes of conveyance. In treating of the general requisites of a deed, it is necessary to keep in view the common form. I shall therefore in explaining the general principles of conveyancing, exhibit the compleatest and most perfect form of a deed.

2. A deed must be in writing or printed. It may be written in any character or language, but must be on paper or parchment. Lands originally were conveyed by parole—But the uncertainty of parole contracts, and their tendency to introduce frauds and per-

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juries, has induced the legislature ^e to nullify verbal conveyances and to require them to be reduced to writing, to render them valid.

3. There must be parties capable of contracting, and of being contracted with, who must be sufficiently and properly described—and in this place we shall consider the persons who are capable of making contracts respecting lands.

In the first place, it may be remarked, that every proprietor of lands who is in possession, is capable of alienating them, unless restricted by some legal disability, or disqualification, and that there are some persons who are laid under such disabilities by law that they are incapable of acquiring lands by purchase. *f* Idiots, and persons of non-sane memory, or distracted persons, infants, and persons under duress are not wholly incapable of conveying and purchasing lands; for their conveyances or purchases are not absolutely void, but merely voidable. But this subject will be amply discussed, when we treat of contracts respecting personal property, and therefore nothing further need now be remarked.

g A married woman may purchase an estate without the consent of her husband, and the conveyance is valid during the marriage, unless he avoids it by some act declaring his disapprobation of the bargain: but if the husband never avoids it, or consents to it, the married woman may after the death of the husband disagree to and avoid it. So may her heirs if she dies before her husband, or if during her widowhood, she does not expressly ratify and confirm the contract. But every other contract of a married woman, (excepting where she joins with her husband in a conveyance of lands, holden in her right,) is not merely voidable, but absolutely void.

Foreigners or aliens, are incapable to purchase or hold lands in this state, by force of statute, which declares, that no person who is not a citizen or inhabitant of this state, or one of the United States of America, shall be capable of purchasing or holding any lands within this state, without special licence from the assembly. This statute is conformable to the common law of England; but

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^e Statutes 250.

f 2 Black. Com. 291.

g Ibid. 292.

in the first settlement of this country, our ancestors, tho they adopted the greater part of the common law of their native land, did not admit this principle, because in a new country, it was necessary to encourage settlers, by holding out every advantage. But when the state had become fully settled and under improvement, it was thought proper to exclude foreigners from holding or purchasing our lands.

Executors and administrators may be empowered by the court of probate, to sell lands for the payment of debts, where necessary, if the estate be not insolvent, if it be insolvent, all the lands are sold by direction of the court of probate.

It is a general rule, that to enable a person to alien his lands he must be in actual possession either by himself, or some person under him, or the conveyance must be made to some person in actual possession. For where a person has the right of possession and property, and a disseisor is in actual possession, the proprietor has not in legal consideration, a compleat title; he cannot therefore convey to any person, but the disseisor, who has that part of the title in which the disseisee is deficient. But this must be understood to be where the person in possession claims to hold the land by an adversary title, and not under the proprietor. If the possessor, be in under the actual proprietor, then his possession is the possession of the proprietor, who may sell to a stranger. So if one person sell to another, who sells to a third, the first continuing in possession, yet the last conveyance is good, because the first seller cannot claim to hold the land against his own warranty. The reason of the law is, that it is improper and dangerous to permit pretended and disputed titles to be bought and sold; which would in reality be a transference of law suits from one person to another, and be a great encouragement to the propensity to litigation, too natural among mankind. For a man of large property and keen passion for contention, might buy up such pretended titles and fill the country with litigious and vexatious suits. *b* Such has been the common law of England, and in this state, by the statute to prevent frauds, quarrels, and disturbances in bargains, leases and other alienations of lands, it is declared, that no possible mode of conveyance, of any kind of estate in things real, shall be good and effectual

effectual in the law, where the person conveying is disseised or out of possession, unless the conveyance be made to the person in actual possession. Such conveyance is deemed absolutely void, and therefore the property remains in the person who attempts to sell, who may notwithstanding such conveyance, bring his action in his own name, and recover the possession. It has therefore been practised in these cases, for the person to whom the conveyance is made, to bring forward an action in the name of the person of whom he purchased, against the person in possession, and on recovery and obtaining possession, he may by force of the covenants contained in his deed, hold the lands against the person of whom he purchased. ; But executors and administrators who sell lands by order of the court of probate, are not within the reason or letter of the statute, for they act in right of others, and cannot be said to be seised or disseised of lands.

Reversions and vested remainders, may be transferred, because the possession of the particular tenant is deemed in law, the possession of him in remainder and reversion. Therefore, tho a man has given a lease of his lands, he may before the expiration of the lease, execute a conveyance to another person, of the reversion dependent on the termination of the lease: yet contingencies and mere possibilities, tho they may be released or devised, or may pass to the heir or executor, cannot be assigned to a stranger, unless coupled with some present interest.

4. To render a deed valid and effectual, it is necessary that there be a good or valuable consideration, for if there be no consideration the deed is of no force; being construed to enure for the benefit of the grantor only. A good consideration is said to be that of blood, or of love and natural affection. Undoubtedly a voluntary gift, on motives of friendship would be good, tho in such deeds it is usual to express an additional consideration of some small sum of money, which is a sufficient consideration against the grantor, but all conveyances merely on what the law calls good consideration, may be set aside, in favour of bona fide creditors. A valuable consideration, is for money, marriage, or the like, where
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there is an equivalent given by the purchaser. Such conveyances executed bona fide, cannot be vacated in favour of creditors.

A deed that is founded upon a usurious contract is void, and so are all conveyances that are executed by fraud or collusion, with an intent to cheat or deceive honest purchasers and lawful creditors. The statute against fraudulent conveyances, declares, that all fraudulent and deceitful conveyances of lands, tenements, and hereditaments, shall be utterly void, notwithstanding any pretence or feigned consideration, excepting between the fraudulent parties.

5. There must be a subject matter or something which is contracted for, and sold, which must be sufficiently and properly described. Thus, it is essential that the land intended to be conveyed, be so located, butted, bounded and described in the deed, as that it can be known where it lies, and be distinguished from any other tract of land; or there must be such reference to some known and certain description, as will reduce the matter to a certainty. Thus a reference in one deed, to some other deed or thing, by which the description can be known with certainty, is good and sufficient.

6. The deed must also ascertain the quantity of interest, or kind of estate which is granted. This may be done in the premises, or when the parties are first described, but is usually reserved for the province of the words *to have and to hold*. But if the kind of estate be determined in the first part of the deed, any subsequent variation will not alter it. For instance, if lands be granted to a person and his heirs and assigns forever, to have and to hold to him for life, and then to another in fee, he shall take an estate in fee, by the first expressions, and which cannot be altered by any subsequent words in the deed: for the first words create the estate, and the rule in construing deeds is, that the first words shall operate. But the usual method is not to limit or define the estate, till we come to the words, *to have and to hold*, and then it is done by limiting it to a certain person and his heirs and assigns forever, or to a certain person during life, or for years, and then to some other person according to the nature of the estate to be conveyed. The expression *to hold*, has no signification in our deeds. In early times, it was used in England to designate the species of tenure by which

which the lands were to be holden, as by knight's service, or soccage, or of the capital lords of the fee. But in this state, as all our landholders have an allodial title, they cannot be said to hold of any person. But as this word was originally used in conjunction with the word, *to have*, it has been continued to be used without annexing any meaning to it, and in violation of the rules of propriety.

7. We next consider any terms, stipulations, reservations or conditions that may be annexed to a deed. In England, while the feudal system was in force, there was alway a reservation of some rent, either in certain services to be performed, or money to be paid, according to the nature of the estate. Our lands are not incumbered with any such slavish reservations; but the parties may and very frequently do, make reservation of rent in leases. Grantors frequently reserve to themselves some right, privilege, or benefit in the granted estate. If the estates be dependent on some condition, then a clause pointing out the contingency, will be inserted, and if the condition be not fulfilled, then the estate to remain in the grantee, otherwise to be defeated: but if the grantee hold on condition of performing certain conditions, then on failure to revert to the grantor.

8. Deeds usually contain certain covenants, which are denominated covenants of seisin, and warranty: for the grantor warrants to the grantee, that at, and until the enfealing of the deed, he is well seized of the premises, that he has good right to sell in such manner, as he in fact does sell, and that the same is free from all incumbrances. He then proceeds to bind himself, to warrant and defend against all claims and demands. In these covenants of seisin and warranty, the grantor usually binds himself, his heirs, executors, and administrators, which are therefore denominated covenants real, and will descend upon the heirs, executors, and administrators, who are liable to fulfil the same, so far as they have estate, or assets, which descend to, or come into their hands; in which case they stand upon the same footing as the grantor: but if they receive no estate, then they are under no obligation to fulfil such covenants. The difference between the covenants of seisin, and of warranty, is this. An action may at any time be brought

brought by the grantee against the grantor, if he had no legal title to the land, at the time of the sale, without waiting for a trial at law, to decide the title, or an eviction. Thus if a man conveys to another, lands to which he has no title, the grantee may instantly bring his action upon the covenant of seisin, for the grantor has broken his covenant, because he is not seized according to it. But where the grantee obtains possession of the premises, and is evicted by some person who has the legal title, then an action lies upon the covenant of warranty. It is the usual practice when an action is brought against a person to recover the land in his possession, to notify, or cite the grantor, who is called the warrantor or voucher, or his heirs, to come in, and defend in the action; and in case the grantee be evicted of the lands, then the voucher, or his heirs, on an action brought against him or them, on the covenant of warranty, cannot be admitted to contest such judgment, but shall respond all damages: but if the grantor, or his heirs, be not cited, then in an action brought on the covenant of warranty, they may contend the prior judgment; but if it be found that the grantor had not the title of the land, the grantee will recover his damages and costs.

l Where land is transmitted from sundry persons, with usual covenants, and the last purchaser is ousted by reason of the defective title of the grantors, and his immediate grantor is a man of no property, and unable to make good his covenants, then the last purchaser may call upon either of the antecedent grantors, who is able, and compel them to respond damages, because in deeds the covenants run to the grantee, his heirs and assigns.

m To constitute an express covenant of warranty, the word *warrant*, must be used; to bind the heirs, the word *heirs* must be inserted; to enable the assignee of the grantee to maintain an action on the covenant of warranty against the grantor, the word *assigns* must be in the deed.

n There are also implied warranties, or warranties in law. In partition, or exchange of lands, a warranty is implied. So in a lease of lands for a consideration paid, or reserving rent, the law implies a warranty. In a feoffment, or deed in fee, by the words,

l Co Lit. 284.*m* Ibid.*n* Ibid.

I have given, the feoffor only is bound to the implied warranty, and not his heirs, by the common law of England. *p* Before the statute which prohibited the subinfeudation of lands, if a man had given lands by the expression, *I have given*, to have and to hold, to him and his heirs of the donor, and his heirs, by certain services, then the donor and his heirs were bound to the implied warranty : but if the lands were given to be holden of the chief lord, then the donor was bound only during life. For in these cases, the contract is personal, and while the consideration is continuing by the performance of services, the warranty continues even to the heirs ; but when the tenure resulted back to the superior lord, the contract being personal, there was no consideration to extend it to the heirs. In this state there can be no question, but that the feoffor is personally liable in a deed in fee, with the words, *I have given*, upon the general implied warranty, even if the deed contains a special warranty against all claims from him, or his heirs ; but it is a question how far the heirs are liable. Where estate descends from the ancestor to the heirs, sufficient to fulfil such warranty, there seems to be the same reason to render them liable, as there was in England, at the time when lands were conveyed to a person and his heirs, to hold of the donor, and his heirs, by certain services. For the ancestor has received the property of the donee, and has left property to descend to his heirs, sufficient to make good the warranty.

7 Warranties extend not only to the title, but to the quantity of land contained in the deed. If however, the quantity be left uncertain, as where it is expressed, be the same, more or less, there is no warranty. So where there was a conveyance of a tract of land said to contain one hundred and ten acres, described by metes and bounds, the fact was, the seller owned all the land within the described bounds, but there was only ninety acres. In an action on the covenant, the court decided that the warranty only extended to the bounds, and not to the quantity, and that the plaintiff ought either to have measured the land, or had an express warranty with respect to the quantity.

9. The conclusion of the deed ought to mention the date, or the time of its execution and delivery, either expressly or by refer-

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o dedi. *p* Quia emptores terrarum. Co. Lit. 384. *q* Snow vs. Chapman, S. C. 1793.

rence to some time before mentioned. A deed however, which has no date, or a false or impossible date is good, provided the real day of the date or delivery can be proved : for a deed does not derive its force from the date, but from the delivery.

10. It is requisite that the deed be read, when any of the parties desire it : and if it be not done it is void as to him. The subscriber to the deed, ought to read it himself, if he can, but if he be blind or illiterate, then another person must read it to him. If the deed be read falsely, it will be void at least, so much as is read falsely ; unless it be read falsely, by collusion, and on purpose to avoid it : and then it shall be binding as far as it respects the persons, that are knowing to the fraud and collusion, but no further.

11. A deed must be subscribed by the grantor, and attested by two witnesses—for the statute enacts, *r* that all grants, bargains, sales, and mortgages of houses and lands, must be in writing, and subscribed by the grantor with his own hand or mark, unto which mark his name shall be annexed, and also attested by two witnesses with their own hands or marks, unto which marks their names shall be annexed.

f It has been adjudged, that where the grantor directs another person to write his name, or where his hand is guided by another in writing his name, it is a signing of the deed within the statute, and valid to convey the estate. It is the universal practice, to seal deeds, as well as to sign them. Tho this is not expressly required by statute, yet as by the common law, a deed is considered to be an instrument under hand and seal, and sealing deeds having been always practised, it may now be deemed an essential requisite, tho it must be acknowledged at present, to be nothing more than an unmeaning formality, and ought to be abolished.

12. To make a deed valid, it is essential that it be delivered by the party himself, or his certain attorney. This is commonly expressed in the attestation, signed, sealed, and delivered. A deed never takes effect till the delivery ; therefore, if there be no date, or a false or impossible date, the delivery ascertains the time, when it commenced its operation. The delivery of a deed may

tional,

r Statutes, 256. *f* Cray, &c. vs. Stoddard, S. C. 1794.

be absolute, as when it is delivered to the party himself, or conditional, as when it is delivered to a third person, to be held till some condition be performed by the grantee, or the happening of some contingent event, and then to be delivered to the party. In which case, it is not delivered as a deed, but an escrow, a scrowl, or writing; which is never to take effect, till the conditions are performed, or the contingency happens.

13. * The statute law requires, that all grants and deeds, made of houses, and lands, shall be acknowledged before an assistant, commissioner, or justice of the peace. If a person after the execution of a deed, refuses to acknowledge it, the grantee after requiring it, may enter caution with the recorder of the town, respecting the houses or lands, granted or mortgaged to him, which shall secure the interest till a trial can be had: and then a copy of the judgment delivered to the register, and by him recorded, shall establish the title.

14. * A deed must be recorded. The statute law enacts that no deed shall be accounted valid and compleated according to law, but such as shall be written, subscribed, witnessed and acknowledged, and all such grants shall be recorded according to law: that no grant or deed of bargain, sale, or mortgage, made of any houses or lands shall be accounted good or effectual in law, to hold against any other person or persons whatever, but the grantor or grantors and their heirs only, unless the grant, deed or deeds thereof be recorded at length in the records of the town where such houses and lands lie: and the town-clerk or register of every town in the state, shall on the receipt of any deed or conveyance, or mortgage of any house, or land, brought to him, note thereupon, the day, month and year, when he received the same, and the record shall bear the same date.

The regulation adopted by this statute, is founded in the highest wisdom and policy, and has a most effectual operation to reduce the titles to things real to certainty, and lessen the sources of litigation. The records and files of the towns, will shew to every person, that is pleased to enquire, in whom is vested the legal title to lands, and inform him whether he can purchase with safety. This renders all conveyances of lands a matter of much more public no-

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* Statutes, 250.

* Ibid.

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tority, than the ancient method of livery of seisin, or corporal investiture; and as it makes that practice wholly unnecessary, it is probably the reason of its disuse. However, these prudent regulations cannot wholly prevent fraud and difficulty. A man may execute a deed of land to one person, and receive payment, and before the deed is recorded, sell the same land to another, and the last purchaser procure his deed to be first recorded. To obviate this inconvenience, it has been determined, that every purchaser of land shall have a reasonable time to procure his deed to be recorded after the execution of it. But the length of time that is to be considered reasonable, has never been ascertained, and perhaps cannot be, and must be left according to the special circumstances of each case. It has been adjudged where two deeds were taken on the same day, and the last deed was recorded the next day in the forenoon, and the other in the afternoon, that the first deed was recorded in reasonable time, and should hold the land. The propriety of this decision cannot be questioned: but then it has been determined, that where the person was not more than seven miles distant from the town-clerk's office, that more than two years was a reasonable time. This decision goes in some measure to defeat the design of the statute, and renders it impossible in some instances, to determine the owners of lands by the records of the town. A person having the title to lands apparent by the town records, may have sold, and conveyed them a long time before, and the purchaser has neglected to record his deed. Another person on discovering the record title to be in his favor, and being ignorant of the sale, may purchase, pay his money, and record his deed. Then the other deed may be produced and recorded, and if a court should think it to have been recorded in a reasonable time, and they have judged two years to be a reasonable time, the other conveyance is defeated. The statute ought to have fixed a certain period, within which deeds should be recorded, after their execution, so as to have avoided this difficulty: but as none is fixed by statute, courts in ascertaining a reasonable time, ought to allow a person no more time than is necessary, by using due diligence to accomplish the business; for the recording of deeds ought not to be delayed, as it is intended to furnish public evidence of the title of lands: and if
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the time be extended beyond what is necessary to procure the deed to be recorded, an honest man, instead of deriving information from the records of towns, will be misled by them, and defrauded of his property. But where the second purchaser has knowledge and notice of the first purchase, tho the deed be not recorded, if he procures his deed to be first recorded, yet he ought not to hold the land. For where the second purchaser had notice, he could not be deceived, and it was a fraudulent, dishonest act to purchase, knowing the former sale, and to take advantage of a bona fide purchaser, because he had neglected to record his deed. The world therefore must approve the maxim, that notice of the first sale to the second purchaser, shall defeat his purchase, tho he procure his deed to be first recorded. For the object of the law in requiring the recording, is only to give notice of conveyances, to secure subsequent purchasers against prior secret conveyances and fraudulent incumbrances, and where a man has actual notice, it answers the same purpose, as if the deed was recorded; and if he will take the legal estate, after notice of a prior right, he is a purchaser mala fide, tho he pays a valuable consideration, and conforms to the requisites of the law. He ought not therefore to hold against the bona fide purchaser. But if a purchaser for a valuable consideration, should not procure his deed to be recorded, within a reasonable time, and another without notice should purchase the land and procure his deed first to be recorded, he will be entitled to hold it both in law and equity; and no court, in a case so circumstanced, should give to the first purchaser, any longer time within which, to record his deed, than what is necessary by the use of due diligence. So that the question will commonly be, whether the subsequent purchaser had notice of the prior conveyance. The same reason ought to apply in cases of attaching lands, and levying executions thereon. If the attaching creditor, knows that the land has been previously conveyed by his debtor, for a bona fide consideration, tho the deed is unrecorded: yet it is not just for him to attempt to take it from the purchaser, to pay the debt of another, for if a man neglects to procure his deed to be recorded, for the purpose of screening the estate from his creditors, yet it may be taken for his debts, and equity will compel a conveyance, so that the estate is liable for his debts, tho the deed is unrecorded.

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• These principles respecting notice, have been recognized by the courts of laws in England, in those parts of the kingdom, where conveyances of lands have been required by law to be registered.

Having considered the requisites of deeds, we are next to consider how they may be destroyed. If a deed want any of the material requisites before enumerated, it is void, excepting however the requisites of acknowledging and recording. The want of an acknowledgement may be supplied by the feoffee, and a deed unrecorded is good against the feoffor. But in this place it is our object to consider, what acts may be done after the execution of the deed, by which it may be rendered of no effect.

I. *As to alterations.* Anciently, if there were any rasure, or interlineation in a deed, the court on inspection, determined it to be void : but afterwards, this was left to the consideration of the jury upon the proof, and if they found the rasure or interlineation to have been done before the execution, the deed was adjudged valid. To a void uncertainty in this respect, it has been usual where there was an interlineation, or rasure in the deed, to make some memorandum at the time of the execution and attestation. But now whether any such memorandum be made or not, a mere rasure or interlineation, shall not of itself be presumed, to be done after the execution of the deed, so as to vitiate it : but shall with the whole of the deed, depend upon the proof, for its validity, and be submitted to the consideration of the jury, to determine whether it be the individual contract, delivered by the parties.

If a deed be altered by a stranger in a point not material, without the consent of the feoffor, it will not nullify the deed, because it does not change the contract : but if it be so altered in a point material, it is vacated, because it does not contain the actual contract of the parties.

But if a deed be altered by the party himself, tho in a point not material, it is rendered void. For when the party himself, makes any alteration in his own deed it discharges the contract : for the parties having agreed upon the precise form of words for

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their contract, if the party in whose favour it is, attempts to alter it, he makes a new contract in construction of law, which discharges the first contract: and the new one being made with himself without the consent of the other party, is absolutely void, and ineffectual. But the principal reason of this rule is, to prevent people from making any alterations in their deeds for fear of vacating them. By the common law, the breaking off the seal vacates the deed.

2. Deeds may be rendered void by the disagreement of those parties whose concurrence is necessary. Thus in cases of married women, by the disagreement of the husband, or her own, after she becomes single. So of infants, lunatics, and persons under duress, after the disabilities are removed.

3. Deeds may be declared void by the judgment of courts.—The power of courts of chancery to set aside deeds, which were obtained by fraud, collusion, or by some unjustifiable measures, belongs to a treatise upon equity. In this place, I shall only remark that all fraudulent conveyances to defeat creditors are void as to the creditors, but not the parties, and that creditors may take such lands by execution, and in an action of disseisin to recover the lands, the question respecting the validity of the conveyance may be tried. And if the conveyance be found to be fraudulent, the court will consider it to be void, and the creditor by force of his execution will hold the land so conveyed, in the same manner as if no conveyance had taken place. All conveyances, as gifts upon the consideration of blood, natural love and affection, may be set aside in favour of creditors, in the same manner. A consideration must not only be valuable, but bona fide, for tho an actual payment be made, yet if done mala fide, and the intent is to defeat creditors, the deed is void.

It may be considered as a general principle, that a deed cannot be void with respect to a debt contracted subsequent to its execution: * but it has been determined where a person made a sale of lands without consideration, and continued in possession, and appeared to be the owner, that such deed was void, as it respected

* *Mason vs. Rogers*, S. C. 1791.

a debt contracted during such possession. In this case there was ground to presume, that such sale was made with a view to enable the seller to contract debts, and avoid the payment; but where a sale is made without consideration, and the purchaser goes into possession, a subsequent creditor does not trust the seller, on the credit of such estate, and of course as to him, it cannot be a fraud.

y No person can take advantage of a fraud, to set aside a conveyance, but he who is prejudiced by it, and has legal title. Therefore, where it appears that the defendant has no title, he can take no advantage of a fraud in the title of the plaintiff, for this was no prejudice to him.

We have considered the nature and requisites of deeds in general, we proceed in the next place to a survey of the several kinds of deeds, or modes of conveyance adopted by our laws.

1. A deed in the form I have already described, is the most universal and approved method of conveying estates in fee simple. This instrument of conveyance, is denoted by the word deed: and this word in common understanding is appropriated to signify that instrument only. For tho in legal consideration, a deed comprehends every species of conveyances, as well as bonds and covenants under seal,—yet in common practice, we have appropriated this general term, to point out this particular instrument, in stead of the particular term, which would be feoffment: and the other instruments of conveyance are distinguished by their particular names, yet in our law proceedings, we consider the word deed, according to its legal import.

Our deed is the same with the ancient feoffment used in England, varying only so as to exclude certain terms, which had immediate reference to the system of fends, and by way of distinction among lawyers, it is still called a feoffment. The operative words usually inserted in deeds are, give, grant, bargain, sell, alien, enfeoff, convey:—either of which would be sufficient to transfer the estate. The sellers are indiscriminately called, donor, grantor, or feoffor, and the purchasers, donee, grantee, or feoffee—By deed estates in fee-simple, fee-tail, and for life, which are created by

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the act of the parties, are transferred. As we know of but few estates, excepting fee-simple, our conveyancing can boast of a simplicity, conciseness, facility, and cheapness, superior to any other country.

The original mode of conveyance in England was oral, and the evidence consisted in livery of seisin, or corporal investiture of the land in the presence of the freeholders of the county. This was the general method in those rude and ignorant ages, when the people were unacquainted with letters, or incapable of writing. But the uncertainty of such conveyances, soon led them when they had acquired sufficient knowledge to introduce conveyances in writing. They first adopted the simple and concise mode by feoffment : but for the purpose of rendering the transaction notorious and public, they accompanied it with livery of seisin, or the corporal tradition of the possession of the lands. Some inconvenience resulting from the requisite of delivery of possession of the lands transferred, induced them to adopt various modes of conveyance to elude it : and lease and release, are now the most common mode of conveyance in England, and in those of the States in America, who have closely copied the English law. This mode of conveyance is so abstruse and intricate, that it requires much technical knowledge to be able to draw it, and is so voluminous, as to be attended with great expense. In a country where a free transfer of real property is admitted, it must be very inconvenient to have it encumbered with such intricate and expensive modes of transference. In this state, we have reason to revere our ancestors for the liberal spirit that led them to deviate from the laws of the country, from whence they emigrated and establish a mode of conveyance, so plain that every proprietor of lands can easily acquire sufficient knowledge to draw instruments to transfer them.

In this state the law requiring the recording of deeds, superseded the necessity of an actual delivery of possession of the premises. For as this is a much more effectual mode to make the transaction known and public, it would be superfluous to continue the common law practice of delivery of possession. It is unquestionably, upon this principle that that practice has been generally

discarded, tho it is true there are some instances, where we see persons go through with the ceremony of delivery of possession by turf and twig, in compliance with the tradition of its necessity.

All that is required by our law, to transfer the estate is, that one party be either in possession himself, or by some person under him : but if a stranger be in possession claiming right, or holding by an adversary title, then the deed is void.

2. A lease is a conveyance of the use of lands for life, for years, or at will ; but must be for a less time than the lessor has in the premises, for if it be of the whole interest, it is an assignment. It is by deed only, that the fee of land passes, and by lease, nothing passes only, the use. The operative words in a lease are, *demise, grant, and to farm let*. Leases are made either in consideration of money paid, or rent reserved in the lease. It is the most common practice, to take leases of lands upon the contract to pay a certain sum, which is paid in hand, or secured by an obligation distinct from the lease, in which case, the lessee purchases a certain term in the lands : but sometimes leases are made in consideration of certain rent reserved in the lease : to which conditions may be annexed, as a forfeiture of the lease, and right of re-entry in the lessor, when the rent is in arrear.

If a person has power, by virtue of a letter of attorney, to make leases for years, generally, he must do it in the name and stile of his master, and not in his own name. He must subscribe the name of the principal, and deliver the lease as his act. For if he signs his own name, and adds by virtue of the letter of attorney, this will not help it, because, by the letter of attorney he acquired no interest, but only the power of acting for the principal.

Leases must be recorded by force of statute, which enacts, a " that
" no lease hereafter made, of any houses or lands within this state,
" for life or any term of time exceeding one year, shall from and
" after the first day of September next, be accounted good and ef-
" fectual in law, to hold such houses or lands against any other per-
" son or persons whatsoever, but the lessor or lessors, and their
" heirs only ; unless such lease be in writing, and subscribed" by

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“ the lessor, and attested by two subscribing witnesses, and acknowledged before an assistant or justice of the peace, and be recorded at length, in the records of the town where such houses and lands are.

“ That no leases of houses and lands already made for term of life, or any term of time, exceeding one year from the time of rising this assembly, shall be good and effectual in law, against any other person or persons, but the lessor, or lessors, and their heirs ; unless the same be recorded in the records of the town where such estate lies, on or before the first day of September next.”

2 It has been adjudged, that writing, giving liberty or licence to flow lands, for the purpose of a mill, is within the law, and must be recorded, or it is void against creditors and purchasers.

Tho a parole lease, is null by the statute of frauds and perjuries, yet it may operate in some instances, as a licence. If a person by virtue of a parole lease, enter into the possession and improvement of lands, he cannot be sued as a trespasser, for the parole lease will amount to a licence to enter. If he plants or sows, he will be entitled to the emblements. He cannot be sued on a contract to pay rent, but where he takes the profits of the land, *indebitatus assumpsit* will lie to recover the value.

3. An *exchange* is defined to be a mutual grant of equal interests, the one in consideration of the other. The estates must be equal in quantity of interest, as fee simple for fee simple, but may differ in valor. The word exchange, is by law appropriated to this case, and can be supplied by no other. This mode is not practised in this state, but the custom is, for each party to execute deeds in common form.

4. A partition is where two or more joint-tenants, co-parceners, or tenants in common, agree to divide the lands, each taking his part and portion. They mutually convey, and assure to each other, the several estates they are to hold separately.

These are denominated primary, or original conveyances ; the following are called secondary, or derivative conveyances.

5. Releases, which are a discharge, or conveyance of a man's right in lands to another, that hath some former estate in possession. The words generally used are, "*remise, release, and forever quit-claim.*" Releases enure to enlarge an estate, as where the remainder man releases his right to the tenant for life, or the reversioner to the tenant for years : to pass a right, as where one co-parcener releases to another : to pass an estate, as where the disseisor releases to the disseisee; or where a person disseised by two, releases to one of the joint disseisors, the disseisor to whom the release is given, shall hold the lands, to the exclusion of the other.

We have in this state a common mode of conveyance, called a quit-claim deed. Tho it be in the form of a release, yet the object is to transfer lands without warranty express or implied. It is therefore a common practice for a proprietor of lands to execute a quit-claim deed to a purchaser, who has neither possession or pretence of claim : and as by our law, a deed is considered in all cases, as giving possession, this operates as a conveyance without warranty.

6. A confirmation is nearly allied to a release, and is defined to be a conveyance of an estate, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased, and the words of making it are, have given, granted, ratified, approved, and confirmed.

7. An assignment is properly the transfer of all the right a person has in any estate, but is usually applied to estates for life, or years. It differs from a lease in this, a lease only grants part of the interest, reserving a reversion, but an assignment disposes of the whole estate.

8. A defeasance, is a collateral deed, made at the same time, with the other conveyance, containing certain conditions, upon the performance of which, the estate then created, may be totally undone. Originally mortgages were usually made in this manner, the mortgagor conveying to the mortgagee, and he at the same time executing a deed of defeasance, whereby the deed to him

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was rendered void on the repayment of the money borrowed at a certain day. But the practice is now to annex the condition to the mortgaged deed, and so indeed of all other conveyances intended to be conditional, which has rendered defeasances as separate deeds, unnecessary.

Before I close this chapter, it is necessary for me to give a slight sketch of the law, respecting uses and trusts. On this subject however, I shall be extremely concise, as our law concerning lands, render unnecessary such modes of conveyance, and it is inconsistent with the nature of this elementary treatise, to go into a minute consideration of all the subtleties and refinements, which have been introduced into that branch of law, by the English jurists.

* Uses originated, it is agreed, from a principle in the Roman law, which admitted a usufructuary property in a thing, distinct from a thing itself, that one person might own lands, and another be entitled to the use. This principle was transported into the English law by the clergy, for the purpose of eluding the statutes of mortmain, which prohibited them from holding lands. As the chancellors were generally clergymen, they countenanced, supported, and established this doctrine. A use, may be defined to be a gift of lands to one person, for the use of another, who in law language is called *cestui que use*. Feoffor, enfeoffs a person of lands to the use of himself, or some other person. The feoffee has the legal property and possession of the lands, while the cestui que use had a right to enjoy the profits. But cestui que use, was considered as having no right to, or in the thing itself. The absolute property was in the trustee, and the cestui que use confided in the conscience of the trustee, for the profits of the land. The chancellor whose peculiar jurisdiction extended to matters of conscience, would compel the feoffee in trust, to perform the trust reposed in him. When the clergy had introduced this artificial principle of jurisprudence, it was adopted by civilians to avoid the restraint, and hardships of the feudal system, upon the proprietors of lands, which they then began to feel to be very burdensome and oppressive. During the long civil wars between the houses of York and

Lancaster

* 2 Black. Com. 327, Bacon. Title Uses and Trusts. 3 Reeve Hist. English law, 364. 4 Ibid. 126, 159, 242, 340.

Lancaster, this became a common mode of conveyance, for the purpose of securing estates against forfeitures. When uses had become general, a refined system of rules respecting them was adopted. In chancery it was said, every man shall have his remedy according to the intent of the feoffment, and according to conscience, but in the courts of law it is otherwise; for the feoffee shall have the land, and the feoffor shall have nothing against his own feoffment, tho it was upon confidence. The chancery of course assumed exclusive jurisdiction respecting uses.

The regulations respecting uses, that rendered them subservient to the views, the wishes and the interest of the people were :

1. That uses could not be forfeited to the king for treason, by which the estate might be secured to the heir, against that barbarous law of forfeiture, which punishes the children for the crime of the parents.
2. That uses should not be liable to any of the feudal burdens, as escheat for felony, or defect of blood, or wards, marriages, reliefs, heriots, and aids to knight the eldest son, or marry the daughter.
3. That uses should not be extendible for debts, on any legal process, by which the cestui que use was enabled to cheat his creditors.
4. That uses were deviseable, by which cestui que use might make suitable and convenient provisions and settlements for his family, which was deemed a great privilege at the time of the feudal restraints upon devises.
5. That uses might be assigned by secret deeds between the parties, by which the proprietor of the lands might be kept unknown, and the parties avoided the trouble and inconvenience of livery of seisin, or delivery of possession of the land, as required at common law.
6. That husband should not have curtesy of a use, nor the wife be endowed, which gave birth to the doctrine of jointures.

At the same time courts of chancery determined, that uses could not be raised without sufficient consideration, and that they were descendable according to law. It is easy to see the inconveniences that must necessarily result from this metaphysical species of estate, while conveyances could be made in a secret manner, and the land and the use were two independent subjects, and might reside in different persons. Sundry salutary regulations were made to

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avoid this inconvenience without effect, till the famous statute of uses passed in the 27th year of Henry, VIII. which was calculated to cut up uses by the roots. This statute recites the frauds arising from secret conveyances, without livery of seisin, and from wills sometimes in writing, and sometimes by naked words, or tokens by persons, visited by sickness, in their extreme agonies and pains, by designing persons, to the disinheriting of heirs; the injustice that arose in depriving lords of their feudal rights, and the crown of the benefits of forfeitures; the perjuries in the trials of the secret wills and uses, and the uncertainty respecting the property of the lands; and then enacts, that when any person shall be seised of any lands or other hereditaments, to the use, confidence or trust of any other person, or body politic, the person or corporation, entitled to the use in fee-simple, fee-tail, for life, or for years, or otherwise, shall thenceforth stand and be seised or possessed of the land of, and in the like estate, as they have in the use, trust, or confidence, and that the estate of the person so seised to the use, shall be deemed in them, that have the use in such manner, quality, form, and condition, as they had before in the use. Thus the statute executes the use as it is termed, that is, transfers the use into possession; by which means the cestui que use become compleatly possessed of the land in law, as he was before in equity. ^b No words says Reeve in his history of the English law, could be imagined more simple, and at the same time more efficacious for the annihilation of uses, than the purview of this act. By a kind of legal magic, the whole frame of landed property seemed on a sudden to be changed, and every man who had before, only the use of his estate, at the mercy almost of his feoffees, was made in an instant, the compleat and lawful owner of it.

The courts of law instead of sending suitors to the courts of chancery for relief, began to take cognizance of uses as legal estates: and the learning of landed property would have been settled again upon the principles of common law, had it not been for the narrow, technical, and illiberal notions of the judges. They determined that no use could be limited on a use, and that
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^b 4 Reeve's hist. Eng. law, 245.

when a man bargains, and sells his lands to another for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant, that the statute did not extend to terms of years, or other chattel interests, because the expression was only seised, and the termor is not seised but possessed, and that where lands are given to one, and his heirs, in trust to receive the profits, and pay over to another, this use is not executed by the statute : for the land must remain in the trustee to enable him to perform his trust.

These decisions of the courts of law rendered necessary a recurrence to the chancellors, who took cognizance of such cases, and in a short time revived under the denomination of trusts, their jurisdiction of uses, for it was easy to vary the form of words, by which the conveyance was expressed, so that according to the decision of the courts of law, the statute of uses would not execute the use, or transfer the uses into possession ; and then the courts of chancery would take cognizance of them as trusts.

So that the whole effect of the Statute of Henry, VIII. on uses, was to render it necessary for the chancery to elude it, to change the name of uses into trusts. This statute however gave efficacy to certain new modes of conveyance, calculated to render these transactions secret and save the trouble of livery of seisin. Such as a covenant to stand seised to uses, and lease and release, which are the common modes of conveyance in England.

But when the courts of chancery resumed their jurisdiction over uses under the name of trusts, they adopted rules which were calculated to avoid the inconveniences that were derived from uses. They considered a trust estate to be equivalent to a legal ownership, governed by the same rules of property, and liable to every change in equity which the other is in law.—The cestui que use, has no right in, or to the thing in law, but in equity he has. The trustee is considered as the mere instrument of conveyance, and cannot effect the estate. Yet in consideration of law he is the proprietor of the estate, but not in equity. The trust will descend, may be aliened, is liable to debts, to forfeiture, to leases, and

and other encumbrances, and to the curtesy of the husband as if it were an estate at law. The trustees may be compelled in chancery to make conveyances to the cestui que trust, or such other persons as equity may require. Such is the law of England, respecting uses and trusts.

But as in this state, none of the reasons exist that did in England, for their introduction, and as no advantages can be derived from them it is not probable that they will ever be adopted. The recording of our deeds, precludes the possibility of a secret mode of conveying estates, by which the legal estate can be concealed, or rendered uncertain, and a provision for prodigal children may as well be made by giving them the use of the estate during life, or to another in trust for him—as in both instances, the estate will be equally at his controul and equally liable for his debts. The truth is, our general law has given the proprietors of land, every honest privilege that can be derived from uses, and trusts; that is, exemption from forfeiture and the feudal incidents, and the power of devising, and has deprived them of every unjust privilege, that was acquired by the cestui que trust, that is, exemption from liability to be taken for debts, and the power of secret conveyances, tho there be no necessity of a formal public delivery of possession.

If the decision of the superior court in the only case which has come before them, be considered as law, the business of uses and trusts, is at an end. They have adjudged that the cestui que use, shall take the estate in the same manner, as tho it had been directly granted to him; and that the scoffee, or trustee has no property in the estate, even at law. As this is the only case that has been adjudged on this point, it is necessary to consider it at large. The case was, Nathaniel Cornwell in consideration of love and good will to Abigail Taylor, his neice, and wife of Joseph Taylor, granted to Jeremiah Bacon, his heirs and assigns, the lands in question, to hold in trust for the said Abigail during life, and then for her children, born, or to be born, and to their heirs and assigns forever. Abigal died leaving four children, and Joseph Taylor as their guardian was in possession of the lands, and action

of disseisin was brought against him, by said Jeremiah, to recover the possession ; the court determined, that the children of Abigail had an absolute estate in the lands in question, and that the possession follows the use, that said Jeremiah being only a mere nominal person in the deed, and no consideration arising from him, he is considered as having no legal estate in the premises, by which to recover possession. Their opinion is grounded upon the principle that the doctrine respecting uses established by the statute of uses in England, was in the idea of our ancestors, at the time of their emigration, the law, and that to establish a doctrine of uses here, which would necessarily acquire a number of statutes to remedy the inconvenience, resulting from it, would neither be wise or prudent.

By this decision, it is established that cestui que use, will take absolutely as large an estate, as the use or trust given to him. If the use be to him, and his heirs, then he takes an absolute estate in fee-simple ; if for life, or years, then an absolute estate for life or years, while the feoffee or trustee takes not even the shadow of a legal estate. This extends the statute of uses to trusts, as well as uses, and annihilates all such estates at a single stroke. This was not however a unanimous decision of the court, and the reasoning of the minority demonstrate that the judgment of the majority was against the then existing law.

The courts of common law in England, always recognised the principle, that feoffee or trustee had an absolute estate at law in the lands, and that the cestui que use had nothing but an equitable right, which courts of chancery only could make effectual. The power of a proprietor of lands at common law, to make such conveyances has never been questioned, and certainly, this power exists in the very nature of the title. I may give the use and improvement of my estate to one for years, and then to another in fee. Here the tenant for years, has nothing but the right to use, while the fee is in another person. By the same principle I may give my estate absolutely to one, to hold in trust for the use of another. In both cases, the use and the fee are in different persons.

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The statute of uses, has no more force in this state than the statute of Westminster the second, and our courts may as well make statutes at home, as import them from abroad. Here was a right existing at common law, to create a certain species of estate, and which never had been taken away by statute. No judicial tribunal can take away the right, without exercising legislative powers. To have been consistent, the court should have said, that a person had no right to make such estate, that nothing was passed by the conveyance, and the property was in the original grantor, but to deny him the right of making such an estate, and then vesting the property different from what he intended, is an assumption of power, on the part of the court, to make a disposition of a man's estate, not only without his consent, but against his will : for they might as well have directed this land to have vested in any other mode, as conformable to the English statute of uses.

That our progenitors considered the doctrine of uses, as settled by the statute of Henry VIII. to be law, at the time of their emigration, is at least problematical : for at that time, which was in the reigns of James I. and Charles I. it is a well known fact, that uses had been restored under the name of trusts ; and were then recognized by the courts of law, and effectuated by the courts of chancery. Our ancestors therefore, if they knew any thing of this subject must have had an idea, that trust estates were consistent with the law of England. But at any rate, it is a very far-fetched argument, indeed to say, that the idea of our ancestors respecting the operation of a statute in England, at the time of their emigration, shall be the rule to decide what the common law is, upon a case arising, one hundred and fifty years afterwards.

Considering our general regulations respecting landed property, there can be no reason for apprehending that any inconvenience as the court have suggested, tho they have pointed out none, could result from adopting the doctrine of uses. It therefore would have been better, and much more consistent with law, if Taylor had applied to a court of chancery, and obtained a decree, which unquestionably would have been in the power of the court, that Bacon should have released his right at law, to the children of Abigail,

for whose use he held it. This would have been no violation of the common law. A use or trust would then have been descendable, deviseable, transferable, and liable for debts, like an estate at law, and the trustee under the power of courts of equity, and compellable to make such conveyance, as justice required. Whether our courts in future, will consider this decision to be law, it is not probable will ever be determined; as there is but little prospect that another such case will ever come before them.

CHAPTER SEVENTEENTH.

OF TITLE BY DEVISE.

A Devise is a disposition of real estate in a man's last will and testament. The power of devising has been generally permitted by all laws but those of feudal origin. In England, lands were deviseable before the conquest, but the introduction of the feudal tenures, deprived the subjects of that right, until it was restored by statute in the reign of Henry VIII. At the time when our forefathers came from England, the power of devising, was possessed by the people, and they established it here in the fullest extent. Our statute law declares, ^d that all persons of the age of twenty-one years, of right understanding and memory, whether excommunicated, or other, (not otherwise legally incapable,) shall have full power, authority, and liberty to make their wills, and testaments, and all other lawful alienations of their lands and other estates, and that no wills or testaments, wherein there shall be any devise, or devises of real estate, shall be held good and allowed for any such devise or devises, if they are not witnessed by three witnesses, all of them signing in the presence of the testator.

In this place, it is not my intention to enter into a general consideration of wills, which will be reserved till I come to treat of personal property. I shall say nothing more concerning them than what is necessary to explain the law respecting devises.

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^d Statutes. 3. It is singular, that the word "excommunicate," should have been introduced into the statute, or continued in the revisions, when it is well known that there never was an ecclesiastical tribunal in this state that could denounce a sentence of excommunication, or any other decree, that could effect a man's civil rights.

^e Statutes 123.

f All persons are capable of devising their estates, unless they are under certain disabilities or disqualifications. These are founded upon a want of discretion, or a want of capacity. *g* Infancy, disables a person to devise his estate, for want of proper discretion. *h* So idiocy and insanity, disqualify, for want of capacity. *i* Non-sane memory is a disqualification, founded on incapacity. It is not sufficient, that the testator be of sufficient memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he can make a disposition of his estate, with understanding and reason; which the law calls a sane and perfect memory. Restraint, menace, or duress of imprisonment, is a disqualification at common law, for the statute law expressly designates the other disqualifications, and then says generally, *not otherwise legally incapable*, which must refer to a common law incapacity. Thus if a man in his sickness, makes a will, by the over importuning of his wife, to the end that he may be quiet, this shall be said to be a will by restraint, and not binding. But there must be actual proof of some undue importunement or restraint of the devisor, to avoid a will regularly made. *k* If a person be under any of these disabilities, viz. infancy, idiocy, insanity, non-sane memory, or duress, at the time of the inception of the devise, it will be absolutely void, tho the disability be actually removed before the consummation thereof, by the death of the devisor, for a devise or will is such from the making, and therefore the parties must be qualified, and have ability at that time: and if the person, after the removal of the disability, declares that the will made during the disability shall stand, it is still void. A married woman in England is by statute disqualified to make a devise.—Our statute does not name a married woman, but generally, not otherwise legally incapable. So that a question has arisen lately, whether a married woman at common law, be disabled to devise her estate. In the case of *Adams and Kellogg*, where a married woman devised her lands to her husband, the superior court adjudged that the devise was void, because the devisor at common law was disabled to make it. This decision was afterwards reversed by the supreme court of errors, by which, the law is now settled, that a married woman may make a devise of her own lands, even to her husband.

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f Pow. on devises, 138.*g* Ibid. 143.*h* Ibid. 144.*i* Ibid. 145.*k* Ibid. 173.

The statute law has prescribed no particular form for a devise ; of course any words that sufficiently express the intent, will be a good devise. Neither has the statute made it requisite by express words, that the will be in writing, or be subscribed by the testator. ¹ But it requires that a will shall be witnessed by three witnesses, who shall sign in the presence of the testator, if it contain a devise of lands, to make the devise good. This clearly implies, that the will must be in writing : but points out no regulation respecting the signing of the testator, for tho we should suppose that the witnessing of the witnesses, must be to his signing, yet their witnessing to his publication would comply with the words of the statute. But it is understood, that all wills containing devises of lands, must be in writing, signed by the testator, whether at the beginning or end of the will is immaterial ; sealed as is commonly practised, tho not absolutely necessary, and witnessed by three witnesses, all subscribing their names in the presence of the testator, so that he may have it in his power not only to see them, but he must actually observe them. The witnesses must be legal, in point of character, for infamous persons, who have committed, and been convicted of the crimes which at common law disqualify persons to testify, cannot be witnesses to wills, and in point of interest, for a person who has any interest in the establishment of a will, as a legatee or devisee cannot be a witness. But it has been adjudged by the courts of law in England, in the cases of Wyndham, vs. Chetwynd, and Kindson vs. Keney, that a witness incompetent at the time of attestation, might purge himself afterwards either by release or payment, and become competent by the rule of the law.

All natural persons are capable of being devisees : as well as corporations, or bodies politic. But these last from their nature cannot make a devise. ^m Devisees may be ascertained by nomination, an actual naming of the persons, or by description, so that the person intended can be known. Description, may be by the name of dignity, or office, or by the name of reputation, or nearest of kin and the like. If the name or description be mistaken, yet if the person intended to take, be certain, the devise is good. Aliens cannot be devisees.

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¹ Statutes, 115. ^m Powel on devises, 337.

ⁿ Po
^q Powl.

Every person may devise any estate that he has in things real, and may create by devise, any kind of estate, excepting those which arise from the mere operation of law : and may empower executors to sell lands.

1 A devise is deemed to be a conveyance, and therefore will transfer only such lands as the devisor owned at the time of making devise. Therefore if a man devises lands by particular description, and afterwards purchases them, or if he devises all the lands of which he shall die the owner, and afterwards purchases, the devise in both these cases is void, as it respects the subsequent purchases.

2 A devise by a man to his heirs, to take in the same manner they would have done by descent, is void, and the heirs shall take by descent.

3 A devise was made to a person, and his male heir in fee-tail, in succession forever ; the devisee died leaving two sons ; it was determined that the word heir is nomen collectivum, and signifies him or them who by law succeed to, and inherit the estate of another, and that it included both the sons, who should inherit as heirs at law.

4 A devise may be void for uncertainty, and repugnancy : for it is a general rule in the construction of wills, that whenever there is an irreconcilable uncertainty or repugnancy in the disposition, made by the testator of his real property, the title of the heir at law shall be preferred to all others ; because where the court cannot ascertain beyond a doubt, the meaning of the testator, they must recur to the rules of descent, where there is no doubt. Uncertainty, and repugnancy may respect the thing devised, the quantity of interest meant to be devised, and the person intended to be the devisor. 5 A devise may fail of taking effect by the waiver, or refusal of the devisee. 6 The devisor after the inception, and before the consummation of a devise, may revoke by a disposition of the estate devised, or by a subsequent different devise, by a new will, or by codicil, or by a subsequent marriage, and having children, which is a presumptive revocation, that may be rebutted by proof, or by any alteration in the nature of the estate, by the act of the party, by a stranger, or by the act of the law.

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1 Powell. Dev. 2 Ibid. 431. 3 Larrabe vs. Larrabe, Sup. C. 1793.
4 Powl. Dev. 411. 5 Ibid. 442. 6 Ibid. 532.

* It is a general rule of law, that no parol declarations of the testator, may be offered in evidence to controul, or alter the written disposition of his estate, contained in his will, and that parol declarations shall not be admitted to explain, enlarge, controul, or rescind the language used therein, for the construction thereof is the proper business of the judge, and is restrained to arise out of the instrument alone. No proof can be admitted that the testator intended to create a different estate from what is expressed. If a man devise land to his wife, for the term of her life generally, no parol proof can be admitted, that he intended it by way of jointure, and in satisfaction of dower, because the whole of the will concerning lands ought to be in writing, and no averment ought to be taken out of the will, which could not be collected from the words contained in the will.

* The law will admit the averment of the party, as to matters of fact, respecting wills, where the matter averred is consistent, and stands with the words of the will. Thus if a man has two sons, both called by the name of John, and supposing that the elder who had been long absent is dead, devised his lands to his son John generally, when the elder in fact is living; here the younger may alledge that the devise is to him, and may produce witnesses to shew his father's intent, that he thought the other to be dead, or that he at the time of making the will, named his son John the younger, and the writer left out the addition of younger; for this averment is consistent with the words of the will. So parol proof may be admitted to shew whether the instrument was meant as a will, or a deed. So if there be father and son, both called by the same name, and there be a devise to a person of that name, without distinguishing which, parol evidence may be admitted to prove that the devisor did not know the father, upon which the estate shall go to the son. If words of an equivocal sense be used, a parol averment may be admitted to direct the application. As where a devise was to a son by name, and his christian name was mistaken, but it was added in the service of the duke of Savoy, parol evidence was admitted to ascertain this son, and tho his name was mistaken he had the estate. But if the person be not in some

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manner described in the devise, no averment will be admitted to shew who was intended, because in such case the ambiguity appears on the face of the instrument. No averment will be admitted to supply any thing, that is not written. If there be a blank in the will, no evidence can be admitted to prove how the testator intended it should be filled.

w Parole declarations of the testator, are likewise received in all cases to rebut the constructive declarations of a trust, put upon words contrary to the legal sense of them, which is rebutting an equity, for in such cases the estate is in the devisee, and the averment is in support of the letter of the will. So parole evidence may be admitted in all cases, to counteract fraud, because to decide otherwise, would be to make the rule instrumental in encouraging that, which it is its object to prevent.

Having finished my remarks on deeds and devises, I proceed to a consideration of some general rules respecting their construction.

1. * That the construction be favorable, and as near the mind, and apparent intent of the parties, as the rules of the law will admit. For the maxims of law are, that the words ought to be subservient to the intention, and that writings be favorably interpreted on account of the simplicity of mankind. The construction therefore must be reasonable, and agreeable to common understanding.

2. That where there is no ambiguity in words, no exposition shall be made contrary to the words : but where the intention is clear, too strict a stress shall not be laid upon the precise signification of the words ; for he who sticks in the letter, sticks in the bark. Therefore by the grant of a remainder a reversion may pass, and so the reverse. Another maxim is, that bad grammar does not vitiate a writing ; neither false English, nor bad latin, will destroy a deed.

3. That the construction shall be made upon the whole deed and not upon the separate parts ; that every part be made, if possible, to take effect : and that every word be made to operate in some shape or other.

4. That every deed shall be taken the most strongly against him who is the agent, or contractor, and in favor of the other party.

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5. That if the words will bear two senses, one agreeable to, and another against law, that sense shall be preferred which is most agreeable to law. As if proprietor in fee-tail, lets a lease for life generally, it shall be construed for his own life only, for that is consistent with the law : and not for the life of the lessee, which is beyond his power to grant.

6. That in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received, and the latter rejected ; but in a will, where there are repugnant clauses, the last shall stand : on the principle that the first deed, and last will, are always most available in law.

7. That a devise be most favorable expounded, to pursue if possible, the will of the devisor, who for want of advice, or learning, may have omitted the legal and proper phrases. The law therefore many times dispenses with the want of words in devises, that are absolutely essential in all other instruments. Thus a fee-simple may be created by devise, without the word heirs, and a fee-tail without using words of procreation, if it be apparent that such estate was intended to be created, y as a devise to a man, and his seed, or his heirs male, or any such expressions, evincive of his intent, tho in a deed an estate for life only would pass. The same may be said in respect of estates in remainder and reversion.

CHAPTER EIGHTEENTH.

OF TITLE BY ESCHEAT.

LANDS never escheat by reason of tenure, and of course there are no private persons who take lands on failure of heirs, as was done by the feudal lords, on extinction of inheritable blood in their vassals. Lands escheat to the state, on failure of heirs, according to the rules of descent, or when no owner can be found. z The statute respecting escheats, points out the mode of procedure. The courts of probate are to secure such estates in the hands of administrators, by them appointed for that purpose, and to notify the state treasurer, who has power to dispose of the same, and to render his account to the general assembly annually. If any

y 2 Black. Com. 115. z Statutes, 51.

any heir or owner should afterwards appear, they are entitled to the estate, or a reasonable compensation.

Lands escheat upon failure of heirs, and this happens where there is a compleat extinction of inheritable blood, according to the law of descent.

An heir to a person, is he who on the death of such person, will by the law of descent succeed to his estate. This implies, that no person can be a compleat heir of another, till the ancestor be dead, for it is a common maxim, that no one is the heir of the living. Before the death of the ancestor, those persons who are entitled to succeed to his estate, if he dies intestate, may be denominated heirs apparent, or presumptive heirs. All persons may be heirs, excepting monsters, bastards, and aliens.

1. *a* A monster, is defined to be a creature born in lawful marriage, that has not the shape of mankind, and evidently has some resemblance of the brute creation. Creatures coming within this description cannot inherit. But then the deformity must be so great, that the being cannot be considered, as a part of the human species: for if the being, be created in human form, tho he be deformed in some parts of his body, as if there be six or four fingers, or the limbs are useless, or distorted, yet he may be a legal heir.

2. *b* Bastards being children born out of lawful wedlock, or not within a proper time after its determination, cannot inherit.— They are considered as the sons or children of nobody, or of every body, and no inheritable blood flows in their veins. Lands therefore will escheat to the state, if there be no other relation to the last owner. Bastards can have no other heirs than the issue of their own bodies: for as they are considered as the children of nobody, there can be no ancestors, by which a kindred or relation can be made. Nor can the course of descents be traced through them. But they must be considered as beginning a new stock or family. The reason of excluding bastards from the right of inheritance, is on account of the uncertainty of their ancestors. But this rule is extended to cases where there is no uncertainty, as the mother of a bastard. Yet by the principles of the common law,

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a 2 Black. Com. 246.

b Ibid. 247.

if the mother dies, leaving lands, or the bastard, leaving lands, and a surviving mother, they cannot be heirs to each other; but the estate shall escheat or go to the lawful heirs.

3. *c* Aliens or foreigners not belonging to this or any of the United States, are incapable of holding lands in this state, by virtue of a statute made for that purpose, and of course cannot be heirs. If then, a citizen of this state die possessed of an estate, in lands, and leave relations that are foreigners, either residing in this state, or in some foreign kingdom, they cannot inherit, but the lands shall escheat to the state. So if a citizen should leave remote relations that were legal inhabitants of this state, and nearer relations that were foreigners, the remote relations belonging here, must inherit in preference to the foreigners.

In respect however to the lands that were holden in this state by foreigners, at the time this act was passed, I presume that they will descend to the heirs of such foreigners, who shall continue to hold them till their death, in the same manner, as tho this statute had never passed.

CHAPTER NINETEENTH.

OF TITLE BY EXECUTION.

THE mode of acquiring title to real property by execution, was not derived to us from the law of England, for there, a title to lands in fee simple, cannot be acquired by the levy of an execution. But they may by force of the statute of Westminster second, pray out an elegit, a particular kind of execution, by which half the lands of the debtor may be extended, and holden by the creditor until the debt be discharged. But in this state, by force of the statute, respecting the levying of executions, it has become a very common mode of acquiring the title to lands, by the levy of an execution. Whoever has an execution against a debtor, owning lands, may levy the same on them, provided the debtor is unable to discharge it by the payment of the money, or cannot tender sufficient personal estate to satisfy it. The creditor however has no legal right to levy on real estate, if personal can be had. He has the right
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of election, respecting the taking of lands, and the debtor cannot tender them on the execution, to save his body from imprisonment: the creditor may elect, to take the body, or lands, but if personal estate can be found, it must be levied upon in preference to either. The officer cannot levy the execution on lands, without the express direction of the creditor, tho they are inserted in the execution.

The mode of proceeding being clearly pointed out by the statute in this case provided, it will be sufficient to recite that part of it which relates to this subject. *d* By this act it is enacted, that all lands and tenements, belonging to any person in his own proper right in fee, shall stand charged with all the just debts owing by such person, as well as his personal estate, and shall be liable to be taken in execution for the same, where the debtor or his attorney shall not expose to view, and tender to the officer personal estate to answer the sum mentioned in the execution, with all charges. And all executions duly served upon any such houses, or lands, being with the return of the officer thereon, recorded in the records of lands in the town wherein such houses or lands are situate, shall make a good title to the party, for whom they were taken, his heirs and assigns forever: and whenever any execution shall be levied on lands, the same shall be appraised by three indifferent freeholders of the same town where such lands lie, or if that town be a party, then of the next adjoining town, one of whom may be chosen by the debtor, and another by the creditor, and if they do not agree in chusing a third, or if either party neglect to chuse, the officer shall apply to the next assistant or justice of the peace, who by law, may judge between the parties in civil cases, which authority, shall appoint one or more appraisers, as the case may require, which appraisers shall be sworn according to law, and it shall be the duty of the officer who levies such execution upon the lands, to cause the execution, with his endorsement thereon to be entered on the town records as aforesaid, before he returns the same into the clerk's office of the court out of which it issued, and the officer shall have two shillings for causing the same to be recorded, with additional fees for his travel.

The Statute contemplates the levy of executions upon lands
holden

d Statutes, 62.

holden by the debtor in fee, without mentioning any lesser estate. But it is clear, that where a debtor holds a less estate in lands than a fee, the execution may be levied on the same, in the manner as the statute directs in case of an estate in fee, by force of which, the creditor will acquire all the title which the debtor had in it, in the same manner, as he might by a deed describing it as an estate in fee, and would have right to occupy and improve the same during the full term, to which the debtor was entitled. So the execution may be levied and proceeded with in the same manner as in cases of levies on estates in fee : and in the return of the officer, the particular estate which the debtor has, may be described and appraised according to its value, having regard to its continuance, which levy would unquestionably convey to the creditor, the estate of the debtor : But then in all cases, where a levy is made upon lands, in which the debtor has an estate, less than a fee, the whole estate of the debtor must be taken, set off, and appraised : for our law will not admit that a levy should be made for any particular number of years, which are or may be less than the estate of the debtor, by which it would at the expiration of the time, for which it was taken, revert to the debtor. But the whole estate must be taken, and may by the appraisers be estimated according to its real value.

Neither does our law admit the levy of an execution on lands, to be holden till the rents and profits discharge the debt.

A question has often arisen with respect to the power of creditors, to take by execution, crops growing on lands, which are cultivated by tenants at will, or by sufferance, or on short leases. An idea has been entertained, that the execution may be levied on the crops of grass, or grain, or any thing else while growing, and that they may be severed and sold as personal estate : but the law will not warrant such a levy. In all cases where a tenant at will, or by sufferance, or on a short lease, has grain or grass or any other thing growing on the land, he has by law a right to all such use of the land, as will be necessary to take the benefits of his grain, or grass that is growing. While growing it is considered as a part of the realty. The only mode of course of proceeding against such tenant, to obtain such estate by execution, must be by levying

levying upon the lands, and taking the whole of his estate however short or long the duration may be, and by force of such levy the creditor will acquire the same right, to gather the crops of the debtor, as the debtor had. But execution cannot be levied on grass, or grain while growing, because it is annexed to the realty, and such levy can give the officer no right to enter on the land of another, to harvest the grain, and carry it away. All crops belonging to any other person, than the owner in fee, are annexed to the freehold, and therefore cannot be considered as personal estate. But his right to carry them away, may be levied upon, as well as any other estate less than a fee.

e It has been determined, that the levy of an execution on a leasehold estate, for the term of nine hundred and ninety-nine years, is good, and that such a term is to be appraised, and not sold at the post. This decision, fully recognizes the doctrine before laid down of the levy of executions on estates less than fee simple.

f In an action of disseisin, the plaintiff claimed by the levy of an execution, to which the defendant made the following exceptions; that there was a written agreement, that the execution should not be taken out so soon as it was by two months, that the justice who appointed one of the appraisers, was not the nearest justice to the land, that the appraiser appointed by the debtor, and agreed to by the creditor, was tenant to the debtor, and not an indifferent freeholder: but the court determined that the written agreement was not admissible evidence to defeat the title of the plaintiff, that by next, the law did not strictly mean the nearest, but some in the town where the land lies, if there be none there, then the next living out of town: and that the tenant of a party was not excluded by law, from being an appraiser: and where the parties had knowingly agreed upon him, they are estopped to say he is not indifferent, especially the debtor, whose tenant he is, and who chose him.

g It has been decided, that where a person obtains a judgment against an absent debtor, and prays out execution, without giving bonds to refund according to the statute, and levies his execution

e Man vs. Carrington, S. C. 1793. *f* Cheesborough vs. Clark and Fanning S. C. 1789. *g* Marcy vs. Ruff, S. C. 1790.

on lands, that such levy is good, tho no bond was given, for the provision of the statute is in favour of the debtor only, and not of creditors.

• It has been adjudged, that if the creditor and debtor agree on appraisers who are not freeholders in the town where the land lies, that the levy of the execution will be void, because the agreement of the parties cannot alter the law.

• A levy of an execution on lands, has been adjudged to be good, tho it did not appear from the officer's return, that he had made a previous demand of satisfaction of the debtor. But it appeared that the debtor appointed one of the appraisers, by which it might be presumed, that the demand was made, or the debtor agreed to wave it ; but regularly such demand ought to appear from the return of the officer. • A creditor levied execution on lands, and procured the levy to be recorded in the office of the town clerk, but neglected to procure it to be recorded by the clerk of the county court, till after another creditor had procured a levy of an execution on the same land, and caused it to be recorded with the town and county clerks. The last levy was held good, tho the creditor knew of the prior levy, because the statute is express and positive, that the levy must be recorded by the clerk of the court whence the execution issues, to make it valid.

CHAPTER TWENTIETH.

OF TITLE BY POSSESSION.

BY our law, in no instance can a man obtain even a temporary title to land by occupancy, on the principle that it has assigned no legal determinate owner : but where the owner neglects to keep possession of his lands and permits a person to occupy it, for the term of fifteen years, without enforcing his claim, such occupant during this time, is deemed a trespasser, but at the expiration thereof, his occupancy becomes transformed into a title, which the original proprietor cannot defeat.

In a review of the system of our laws, we find that it has been the

• Chapman vs. Griffing, S. C. 1790.

• Topliff vs. Davis, 1793.

the policy of the legislature to narrow the sources of litigation by a variety of statutes of limitation. For the purpose of avoiding suits, respecting controverted titles to lands, and to reduce them to the utmost simplicity, we find a statute enacted in a very early period of our government, that limits our researches for titles to lands to the short period of fifteen years.

The statute in substance enacts, that any person who has any right or title of entry into any lands or tenements, withheld from him, shall not make entry into the same, but within fifteen years next after the right or title thereto shall descend or accrue to him; and in default of such entry, such person and his heirs, shall be utterly excluded and disabled from ever making the same after that time. In this statute there is a proviso in favour of infants, feme-coverts, married women, persons non compos mentis, imprisoned, or beyond the seas, at the time the right or title shall descend or accrue, and of their heirs—and they may notwithstanding the expiration of the time of fifteen years, bring their action, or make their entry: but this must be done within five years after arriving to full age, discovery, recovering their reason, enlargement out of prison, or coming into New-England, or the state of New-York, and their heirs must make their entry, or bring their action, within five years after the death of the person, in whose right they claim, and at no time afterwards.

The expression of the statute taking away the right of entry, we should at first blush suppose intended nothing more than to drive the person to his action at law, and only exclude him from substantiating his claims by his own act of entry. For at common law a person may be debarred of his right of entry, and yet have a right of action: as where disseisor dies, and the land goes into the possession of his heirs, the proprietor is excluded from his entry, and driven to his writ of right. But we must consider that by our law every person who has the right of property in lands, has the right of entry, as well as the right of action; that therefore the exclusion of the right of entry, by a parity of reason, shall exclude the right of action; and tho the first part of the statute says nothing res-

pecting actions, yet in the proviso of the statute made in favour of persons under certain legal disabilities, the right of action, as well as the right of entry is taken away, after the expiration of the limited time. This clearly manifests the intent of the legislature, and the uniform construction of the courts of law has been, that the statute in all cases takes away the right of action as well as the right of entry.

A person to acquire title by possession, must have the actual occupancy and improvement of the lands. It is generally understood that they must be inclosed with a fence to give such a possession as the law contemplates. This unquestionably is the most conclusive evidence of possession, but it is possible, that a person may have the actual improvement of uninclosed land in such a manner as to amount to possession, and be capable of legal proof: as where a man constantly takes his fire wood from timber land, and takes care of it as his own. For the law goes on the principle, that a total dereliction of property on one part, and an uninterrupted exercise of the acts of ownership on the other part, is the rule to decide the title. But where the lands are uninclosed, and neither party can be said to be improving, the law considers the real owner to be in possession.

A person to acquire this title to lands, must hold the possession by a title or claim adverse to and independent of the proprietor, for where a person enters by the consent of the owner, and can even by implication be considered as holding under the true owner, the possession shall not be deemed adversary, but the possession of the true owner, and no title acquired by it. For the possessor is supposed to deny the right of the owner, and the owner to relinquish it. Therefore where there is an implied recognition of the rights of the owner, the possessor is acquiring no title. ⁱ Therefore in case of a mortgage deed, as a security for money borrowed, if the mortgagor continue in possession, for more than fifteen years, yet he is in, by the consent of the mortgagee, holding under him, and he shall never acquire a right of possession against his deed.

The law considers the owner abandoning his property, as a
forfeiture

ⁱ Beach vs. Royce, S. C. 1791.

forfeiture of his title, but does not expressly decide in whom it shall vest : but the implication necessarily is, that the person who happens to be in the possession at the time the owner is divested, must become vested with the property. He has a right to hold the estate against the former owner, as well as every body else. As the property does not escheat, and as there must be an owner to every thing, the consequence is, that he acquires the title. The law does not require that the possessor at the expiration of fifteen years, should have had the occupancy during the whole of that period, to give him the property. It is sufficient, that the proprietor has been out of possession during that time, and tho there may have been a number of persons occupying during the time, yet the possessor at the expiration of the fifteen years, must receive the title at the moment it passes, by operation of law, from the proprietor. The law therefore cannot be supposed to require that peaceable and uninterrupted possession, on the part of the possessor, as is required at the common law in the acquisition of rights by prescription. Yet where the owner keeps up his claim by entry, or by bringing actions, so that there cannot be supposed to be an abandonment of his right, the statute will not run against him. So where there are joint tenants, tenants in common, or coparceners, and one of the tenants is under either of the disabilities, provided for in the statute, so as to save his right, this shall save the right of all the tenants, tho under no legal disability, because the estate being joint, the saving of it for one, must save it for all.

CHAPTER TWENTY-FIRST.

OF TITLE BY FORFEITURE.

BY the laws of England, a person forfeits all his estate, both real and personal, for almost every crime that can be committed. This extreme severity probably arose from the ferocious, and vindictive spirit of the age in which the laws were made : but in this state, the enlightened minds of the people, revolted at the ideas of cruelty and barbarity in the punishment of crimes. They were satisfied with punishing the offender without extending the punish-

ment to his innocent family, and adding to their misfortunes, by plunging them into poverty. Influenced therefore, by these humane and benevolent sentiments, the legislature, has in one instance only subjected a criminal to the loss of all his estate. * This is for the crime of burning, or attempting, or conspiring to burn public magazines, or vessels, or betray public vessels to the enemy in the time of war. This crime works a forfeiture of the offender's estate, both real and personal, at the discretion of the superior court. This is the only crime for which real estate can be forfeited, and this and man-slaughter are the only crimes which work a forfeiture of goods and chattels. In all other cases, the statute concerning the age, ability, and capacity of persons declares, that such persons as are condemned to death, the charges of their prosecution, imprisonment and execution, being first paid out of their estates, the remainder shall be disposed of according to law. Where the crime is not punishable with death, the criminal holds his estate, after paying, his fine (if that be the punishment,) and the costs of prosecution.

During the late war with Great-Britain, all persons that were adjudged guilty of the crime, of having voluntarily joined and put themselves under the protection of the enemies of the United States, forfeited their lands to the state. But this was only intended for a temporary law.

CHAPTER TWENTY-SECOND.

OF TITLE BY ACCESSION.

THE principle of the law is to assign to every thing capable of ownership, a certain and determinate owner ; and to leave nothing to be acquired by occupancy, which is the original foundation of all property. Therefore in cases of alluvion and dereliction of the sea and rivers, which are a gradual accession of property, the law has determined that the person who owns the thing, to which the accession is made, shall be entitled to the accession. I have therefore considered this as a title acquired by accession, and have ventured to treat of it under that name (as it was not reducible to

any

* Statutes, 66-

any former head) for the purpose of illustrating every principle of importance, that respects our landed property.

1 Alluvion is an imperceptible addition made to lands by the washing of the sea, or rivers, and the addition must be so gradual that it is impossible to ascertain how much ground is added in the space of each moment of time. Thus the gradual alteration of the course of a river, will add to one and diminish the other bank. Where this change is so gradual, as not to be perceptible in any one period of time, the proprietor whose bank of the river is increased is entitled to the addition. So where the sea washes up the sand, and gradually makes firm ground, the adjoining proprietor is entitled to the addition.

m Dereliction is where there is gradual subsiding of the sea, below the usual watermark, in which case—if it be imperceptible at any one period of time, the adjoining proprietor is entitled to it. For the purpose of explaining this subject, it is necessary to consider, in whom is the property of the ocean and the rivers.

All rivers not navigable, belong to the proprietors of the land in which they flow. If their be adjoining proprietors on a river not navigable, and such river be the dividing line, each proprietor owns to the center of the river. This has been adjudged in cases, where the proprietors in the original grants to them were bounded upon the river. Hence, it may be said to be a principle of law, that all streams not navigable, are owned by private persons, and that they have the same power to exclude all persons from the use and improvement of such streams, as they have from using their lands.

All rivers that are navigable, all navigable arms of the sea, and the ocean itself on our coast, may in certain sense be considered as common; for all the citizens have a common right to their navigation; but all adjoining proprietors on navigable rivers, and the ocean, have a right to the soil covered with water, as far as they can occupy it, that is to the channel, and have the exclusive privilege of wharfing and erecting piers on the front of their land. Any person therefore has a right to sail through the water, that covers the land of another, without being liable for a trespass

1 Justinian's inst. l. ii, tit. 1, sect. 20. *m* 2 Black. Com. 261.

trespafs, in the fame manner, as one may pafs through the air which is above the land of another: but no man has a right to do any act in the navigable waters, upon the front of another's land, which can affect the foil, as wharfing, or erecting piers: for in this there is an exclusive property, tho there is not in the water.—Nor may adjoining proprietors erect wharves, bridges, or dams across navigable rivers so as to obstruct their navigation.

n Having considered who are the proprietors of the sea and of rivers, I proceed to remark, that in rivers where the alteration is not gradual, as in alluvion, but is sudden as an avulsion, or where a part of one bank is violently torn away, and carried and annexed to the other, then the proprietor from whose bank such land is torn, shall continue to own it, because he is able to distinguish and ascertain his property. In all rivers not navigable, it is clear that the adjoining proprietor or proprietors shall own all islands that may arise. If there be two proprietors owning on each side the river, then if the island rises in the middle of the stream, it shall be divided between them: if on either side, then the proprietor to whose bank the island is nearest shall own it. But if a river divides itself and afterwards unites again, by which it reduces a tract of land into the form of an island, the land still continues in him to whom it before appertained.

• If there be a sudden dereliction of the sea, by which a large tract of firm land is formed, or if islands appear in the ocean, or in navigable streams, such lands and such islands, are the property of the public, because they spring out of the ocean, and navigable rivers, which are public property. *p* By the Roman law such islands arising in the sea, would belong to the first occupant; and the islands arising in navigable rivers to the adjoining proprietors, in like manner, as by our common law in streams not navigable. This is the only material difference between the common and the Roman law, and it is apparent that the principles of the common law respecting alluvion was borrowed from the Roman code.

q If a river not navigable should suddenly change its channel, the deserted bed of the river would be the property of the adjoining

n Justinian's Inst. L. II. Tit. I. Sect. 21, 22. 2 *o* Black. Com. 262.
p Justinian's Inst. L. II. Tit. I. Sect. 22. 2 Black. 262. *q* Ibid.

joining proprietors, in like manner as they own the river : but if a navigable stream should suddenly desert its channel, and form a new, it would be reasonable that the proprietors of the land through whose land the new channel is made, should have the old channel, as a compensation for the loss of their land, which becomes public property by the flowing of the river through it.

Having considered the right of property in the ocean, and in the Rivers, it may not be improper in this place to consider the right of fishery.

The right of fishery must clearly follow the right of property in rivers, and seas. In all rivers and arms of the sea, not navigable, the adjoining proprietors have unquestionably the exclusive right of fishery. Tho they cannot be said to have a property in the fish swimming in the stream, and before they are caught, yet they have the exclusive right to take them, and whoever disturbs that right is a trespasser. Of course if a person takes fish in a river not navigable, without going on to the land of the adjoining proprietor, he is a trespasser ; and this principle is necessary to establish exclusive property in individuals, to prevent the inconveniences which will necessarily arise from the operation of that erroneous opinion that fishing is common.

Tho it may be considered as a general principle, that in navigable rivers, and the ocean, the right of fishery is common, yet it is under this restriction, that every proprietor is deemed to have the exclusive right of fishery in rivers, and seas adjoining his land, so far as he has the right of the soil, that is, to the channel ; and that no person may take oysters, or any shell-fish from their beds, in the front of another's land, or draw a sein for other fish within the limits above described, tho he does not for that purpose, enter upon the lands of the adjoining proprietor. In an action of trespass for fishing, by drawing a sein in a navigable river, upon the front of another's land, tho it appeared that no entry was made upon the land of the adjoining proprietor, yet it was held, that the action was sustainable in his favour.

The taking of fish in this state, is regulated by a great variety of statutes

* *Adgate vs, Storey*, S. C. 1790.

statutes, in such a manner as to give to the proprietors adjoining on rivers the fairest and most equal chance of fishing, upon all parts of the rivers, but they are too numeroue to be explained in in this place.

CHAPTER TWENTY-THIRD.

OF THINGS PERSONAL.

THINGS personal, are of a moveable nature, and may be transported by the owner wherever he pleases. They also include a species of property already mentioned, which is of a real as well as personal nature, comprehending the immobility of the one, and the limited duration of the other, as estates for years. This might with propriety be considered, as a distinct species of property, but has ever by writers on the law, been treated as a branch of things personal. To obtain a clear understanding of this subject, we must consider that things personal are also called goods and chattels. Chattels are divided into chattels real and chattels personal.

Chattels real, are said to concern or favour of the realty. They are a kind of an estate which may be had in things real, inferior to a freehold: such are estates for years, at will, and by sufferance. They are interests annexed to, and issuing out of real estates. They possess the immobility of things real, which has given them the denomination of real, but as they are of a limited duration, they are considered as partaking of a quality of moveable things, and of course they are called chattels real. This subject we have fully handled in the foregoing part of our enquiries, and it is mentioned here only, to display the connexion between the different branches of our system of jurisprudence.

Chattels personal, are properly things moveable. They contain all those things in which a man can have property, that are capable of being removed, from place to place, and attend the owner wherever he goes. But we must here observe, that there are many things annexed to the freehold, which are capable of being severed and transferred from place to place, as corn and fruits of
every

every kind. So long as they are annexed to the freehold, they are considered as part and parcel of the realty. But when they are severed, they are considered as things personal.

Property in chattels personal, or things moveable, may be either in possession, or in action. Property in things personal in possession, is where the owner has not the only right to enjoy, but the actual enjoyment. Property in action, is where the owner has nothing but the naked right to enjoy, unaccompanied with actual possession and enjoyment.

I. Of chattels personal in possession, a man may have an absolute right of property, and a qualified, limited, or special right.

1. *f* A man may be said to have an absolute property in a thing in possession, where he has the sole exclusive right and occupation. Such property may be had in all inanimate things. So absolute property may be had in all animals of a tame and domestic nature. Such as horses, kine, sheep, poultry, and the like.—For a man may have as absolute possession of such animals, as he can of inanimate things, and they never go out of his possession, unless by accidental straying, or a tortious taking, in which cases, the owner does not lose his property. The stealing of domestic animals, is punishable as a crime.

In regard to the offspring of domestic animals, it is the general rule, that they belong to the owner of the mother or dam, on account of the uncertainty of the male, and the expense of supporting her, and her uselessness during the time of pregnancy. An exception is made in the case of swans, the offspring of which is to be equally divided, because the same attention is requisite in the male and female, and this rule must apply to all animals that associate in pairs.

2. *t* A person may have a qualified, limited, or special property to certain things in possession. This qualified property may be had in animals of a wild nature, and tameable disposition : but an absolute property can never be acquired in them. Where a person has by art, industry, and education, reclaimed an animal from its wild state, and rendered it tame, so that it remains quietly, in

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f 2 Black. Com. 334.

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t 1613. 391.

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his own custody, or where a man has confined an animal in his own immediate possession so that he cannot escape, he thereby acquires a qualified property in it. But these rules apply only to those animals which usually are wild, those animals which we continually find tame, tho they might originally have been wild, yet they are now considered as being subject to absolute ownership.

Animals of a wild nature are of two kinds : those which are of a tameable and those which are of an untameable disposition.—Tameable animals may by the art and industry of man, be so far reclaimed from their wild state, as to remain voluntarily in the possession of the owner, and if they wander out of his possession, they have the inclination of returning, and will return again of their own accord. While animals of a wild nature possess this disposition of returning to their owners, tho permitted to go at large, yet they are considered as their property : but when they lose their disposition of returning, and gain their natural liberty, the owner becomes divested of his qualified property. This qualified property comprehends deer in parks, hares or rabbits in warrens, and doves in a dove house. Animals of a wild nature, and untameable disposition, cannot be considered as the property of any person, only while they are confined by him and are in his actual possession and power. When they are at large, the property ceases, and they may be taken by any person, unless the owner should immediately pursue them on their escape, and then he will undoubtedly have a better right to retake them, than any other person.

Every species of wild animals is subject to this qualified property on being reclaimed or confined : and when they become wild again or escape, any person may acquire in them the same kind of property. A qualified property may be had in bees, when reclaimed and hived, but reducing of them to possession, by hiving them, is necessary to obtain a property in them. It is therefore said, that if a swarm light on my tree, the property is not mine, till I have hived them, and if another person do it, he will gain the property. If a swarm fly from my hive, they continue mine, so long as I can keep in sight and pursue them : but when I have lost them, so as

to be unable to shew that they went from my hive, the property is gone.

" It has been adjudged by the superior court, that a man's finding a hive of bees in a tree, upon another man's land, gives him no right to the tree or the honey, and that a swarm going from a hive, if they can be followed and known, are not lost to the owner.

This qualified property in animals of a wild nature, may be defeated by suffering them to go at large, and regain their native wildness : but while it continues, it is under the protection of the law, and an action will lie in favour of the owner against any person that injures, kills, or detains them. This difference however is made, where the animals are fit for food, and of real benefit to the owner, it is a crime to steal them, punishable by law : but where the animals are kept merely for curiosity, as dogs, cats, apes, parrots, and singing birds, the secret taking of them, can never in the eye of the law be deemed theft : because their value is not intrinsic, but merely ideal, depending on the whim of the owner. Such violation of this property, is a trespass, and an action will lie to recover damages.

A person is said to have a qualified property in animals on account of their inability. As when birds build nests on trees, or any wild creatures make their holes in a man's land, and have their young there, the owner of the soil has a qualified property in such young animals, till they are capable of flying or running away, and then the property ceases. If any person should take or destroy them, they would be liable to an action of trespass. So if a swarm of bees should take possession of a hollow trunk of a tree on my land, and should there deposit their honey, tho I could not have a qualified property in the bees, because they could remove where they pleased, yet I might in the honey, and any person who should cut down such tree and take the honey, would be a trespasser and liable to an action.

" The only kind of wild animals, which our law protects in the possession of the owner, are deer. A person for killing or destroy-

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" *Merrills vs. Goodwin*, 1790

" Statutes 36.

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ing deer in a park, incurs a forfeiture of seven pounds, and the value of the deer, and a fine of thirty shillings : and for pulling down a park, thirteen pounds besides the damages. No person may kill a deer within two miles of a park under the penalty of ten pounds.

A man may have a qualified property in the elements of fire, of light, of air, and of water : this however can subsist only, while he has the actual use and occupation of them, for they being of a fugitive nature, he cannot have the same permanent property as in land. If a person has the actual use of them, and his possession is disturbed, action will lie to recover damages.

If one obstructs another's ancient windows, or corrupts the air of his house or gardens, fouls his waters, or unpens and lets it out, or diverts a water course, the law will give the party injured just damages. This property however subsists only while it is in actual possession, and when it goes out of possession it becomes common again.

A man may have a special or limited property in things capable of absolute ownership, on account of the particular circumstances of the owner, as in case of bailment or delivery of goods to another, for some special purpose, as to carry to some place or to keep safely. Here can be no absolute property because the right and the possession are separated, one having the right, and the other only a temporary right to possess, accompanied with actual possession. The owner is said to have a general property, and the possessor a special property, and in case the things are damaged, or taken away, both have a right of action, the bailee on account of his immediate possession and responsibility to the owner : and the bailor, by reason of his right of property. But one action however can be supported in such cases ; the recovery of one will bar the other. So in cases of goods pledged, or pawned upon certain conditions . Both pawner and pawnee have a qualified, but not an absolute property till the conditions are performed or violated, and then an absolute property is vested in one, or the other. So in cases of attachment, the officer has a qualified property in the estate attached, and may maintain an action for the recovery

recovery of it, if taken away. So an executor or administrator has a qualified property in the goods of the deceased, and may maintain actions for their recovery : but the general property rests in the heirs, legatees, and creditors. But a servant who has the care of his master's estate, has neither the property nor possession, qualified or absolute, but only a mere charge and oversight, and of course, the possession of the servant, is the possession of the master.

II. * Of things in action ; which are, where a person has not the possession and enjoyment, but a right to possess and enjoy the thing in question, and which is recoverable by action.

Wherever a man has a challenge or demand upon another, for a matter of debt or damages, it is called a thing in action. There is a naked right to something, it is merely ideal, and exists only in contemplation of law. This right of action may however be exerted and obtain substantial estate, which is called, reducing a thing in action into possession. All debts due by specialty or simple contract, all promises express or implied, are things in action. The contracts of mankind may be branched into an unbounded variety, and the injuries which individuals may receive from each other, cannot be enumerated : for all these the law has furnished remedies ; and while the mere rights exist, they are called things in action. These rights may be carried into effect by bringing suits, by which substantial property may be acquired in satisfaction of damages. A thing in action cannot be transferred by our law, so as to place the party to whom the conveyance is made, in the same situation with the original party.

I shall close my remarks on this subject, by observing that a right to personal estate may be created to commence in future, that by will, personal estate may be given to one person during life, and then to another forever ; and that the same article may be owned by a number, as joint tenants, or tenants in common, in which case they must all join in any suit respecting it.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE have considered the nature of things personal, and now proceed to treat of the various titles by which they are holden. The original title to property has already been remarked, to have been occupancy : and since the establishment of civil society, all the other modes have been introduced for the purpose of rendering the possession of property safe, and to prevent the disputes that must constantly arise in a recurrence to the original, natural right. But as there are some instances, in which it is difficult to designate the particular owner, it is necessary to resort to the natural title of occupancy. Yet in all such cases the law has pointed out the circumstances under which the right may be exercised, so as to prevent any controversy or doubt.

1. y It is considered as a principle of the law of nations, that any body has a right to seize and appropriate to his own use, the goods of an alien enemy : for when nations are at war, it is considered as consistent with justice and good policy, to annoy each other by every possible mode. Nor can it be strange, that such a principle has been adopted, when we consider, that in the early ages of mankind, and among all barbarous nations the great object of war has been plunder. This has been exemplified in a striking manner, by the conduct of the European nations in the dark ages, when whole nations engaged in the business of piracy, like the modern states of Barbary. This unquestionably is the origin of the present practice of privateering, which has however been systematized by regulations of law, tho not defensible upon the principles of moral right. Private persons are not supposed to possess this power, but it resides in the supreme government of the nation, who may grant commissions to private persons, to make captures on the high seas, of the property of the enemy ; and then such property so taken, shall vest in the captors. If an alien enemy bring goods into the country, after declaration of war, they are liable to be seized, unless he comes under the protection of a passport, or safe conduct. But if an alien enemy, chance to

be

be in the country, at the time of the declaration of war, his property is not exposed to be taken. But as the laws respecting privateers and letters of marque, are derived from the law of nature and nations, it will not be expected that I enter into any further investigation of this subject, in this place.

2. The title to waifs, strays, lost goods, wrecks, and treasure trove, is founded in occupancy ; the first, and last are regulated by the common law, and the other by statute.

1. Waifs are goods stolen and waived, or thrown away by the thief in his flight, for fear of being apprehended. If the owner can be known, the goods belong to him, but if no owner can be found, then to the first occupant.

2. Treasure trove, is where any money, or coin, silver, plate, or bullion are found hidden in the earth, or some private place, the owner thereof being unknown. Such treasure belongs to the first fortunate finder : but if the owner be known, or can afterwards be discovered, it belongs to him. In England it is true, that waifs and treasure trove belong to the king ; but in this state as we have no statute regulation, I presume, that the common law right of the first occupant, must be established.

3. * In respect of strays and lost goods, it is enacted by statute, if any person take up any stray beast, or find any lost goods, worth two shillings, the owner being unknown, he shall carry a true description, with the natural and artificial marks, to the register of the town, where found, within fourteen days, on penalty of forfeiting the value of the goods, or stray beast, one half to the complainant and the other half to the town treasury. The register is to record the description and the name of the finder, and holder of the goods, or stray beast. If the owner appear in six months, and evidence his title to the property, it shall be restored on paying necessary charges, to be determined by the next assize or justice of the peace. If no owner appear within six months, the register appoints two freeholders, who under oath, estimate the value of such goods or beast in money. If the owner appear in six months afterwards, make good his claim, and pay the necessary expenses.

* Statutes, 238.

expenses, he shall have restitution, or the value according to the appraisement at the election of the finder. If no owner appear in twelve months and a day, the value according to the appraisement, after deducting just fees, to the keeper, finder, and register, shall belong to the town treasury, where such goods or beast were found: and the selectmen are impowered to recover and receive the same. The goods or beasts are to be at the risque of the owner the first six months, the keeper being faithful in his care of them; and no beast may be taken up as a stray, unless found in a suffering condition.

4. ^a The statute concerning wrecks of sea, enacts, that if any ships or other vessels, shall suffer shipwreck upon our coasts, no violence or wrong shall be offered to persons or goods: but their persons shall be harboured and relieved, and their goods preserved in safety, till proper authority be informed, and give directions. That whenever any shipwrecked property shall be discovered on any of our coasts, it shall be the duty of the selectmen of the nearest town, and lawful for any person to take the most effectual measures to save and secure the same, and if need be, such person may apply to an assistant or justice of the peace, who is authorized to issue his proper warrant to some proper officer, to impress and call forth necessary assistance. Such persons securing such property, shall immediately give notice to the judge of the county court in that county, who shall direct the sheriff to seize the same, and keep it till disposed of by order of said court. That if any owner entitled by the laws of the land, or the laws of nations, shall appear within a year and a day after such seizure, and claim the same, it shall be restored upon his paying such reasonable costs and salvage to the person to whom it is due, as said court shall order and allow. But if no owner appear within the time, make claim, and pay costs and salvage, such property shall be sold by order of said court, and the avails thereof, be lodged in the state treasury, after deducting reasonable costs and salvage for the persons to whom due. If the property be of a perishable nature such court may at discretion direct it to be sold, within the limited time, and retain the avails for the same purposes: and if no owner appear in a month, to pay

salvage

^a Statutes, 264.

salvage and cost, the court may at any time afterwards sell sufficient to pay the same.

3. The benefit of the elements of light, air, and water, may be taken and holden by occupancy. If a person has an ancient window that overlooks his neighbour's ground, his neighbour has no right to erect another building so contiguous to it, as to obstruct the light : but if a person erect his house close by the wall of another, so as to be incommoded by it, or close by his house so that the light be obstructed, he cannot compel him to pull down the wall, or the house ; for the owner of the wall is the first occupant, and he having claimed his right, cannot be deprived of it. If a man should erect a tan-yard, or exercise any noisome trade, so near the house, or gardens of another, as to corrupt the air, and raise noxious stench and unwholesome steams, an action will lie against him in favour of the person injured ; but when a man has once erected such buildings, and is in the exercise of such trades, and another person fixes his habitation so near, as to be offended thereby, he cannot maintain an action, because the other person had the prior right by occupancy. If a stream of water flow thro a person's land, he has a right to take every natural, and artificial advantage of it, by erecting water-works, or flowing his land, provided he does not wholly divert the water-course, and deprive the adjoining proprietor, on the stream below, of water for necessary and ordinary purposes, as drink for his cattle.

4. The property of animals of a wild nature, while they are so, is acquired solely by occupancy. Any person has a right to take, and to kill all wild animals ; when he has taken them, he acquires a qualified property, and when he has killed them, he acquires an absolute property, and is by law protected in the possession of them.

In England, and the European kingdoms, many wild animals, or as they are denominated, game, are by special prerogative vested in the king and nobility, as hunting is esteemed too princely and noble a diversion for the people at large. The game-laws, which are calculated to preserve the game, bear exceeding hard upon the liberty of the subject. But in this state, the spirit of the people has

never been broken down by such tyranny and oppression. Hunting, fowling, and fishing, are considered as proper diversions for every class of people, and may be said to be free. These sports are laid under no restraints by law, and the people may enjoy them as they please, without restraint or danger of incurring any penalty. To hunt on another's territory, is a common custom. No action will lie in favour of the owner of the land, for any injury for the act of hunting, because the animals which are killed, being wild, cannot be his property. If any action can be maintained, it must be for the injury done by entering on the territory of another without his consent, and the damage to his possessions. For this unquestionably an action would lie, as in legal consideration it is a trespass. *b*

5. *c* Accession is a right of property grounded on occupancy, and herein the common law is copied from the civil law. Thus if any given corporeal substance, receive any accession, by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood, or metals into vessels and utensils, the original owner is entitled to it under such state of improvement, but if the thing itself be changed, by such operation into a different species, as by making bread out of another's wheat, there the property is changed, it belongs to the new operator, who is to make satisfaction to the former owner, for the things he has converted. It has been held that if one takes away another's wife or son, and clothes them, and afterwards the husband, or father retakes them, the property of the garments shall cease to be in him, who provided them, because they are annexed to the person of the woman, or child.

6. *d* In case of the confusion of goods, where those of two persons are so intermixed, that they cannot be distinguished, and separated, there if the intermixture be by consent, the proprietors have an interest in common, in proportion to their shares; but where one wilfully intermixes his property with another's, without his consent, he shall lose it, and the whole shall vest in the other, without being liable to make any compensation. So in the case of accession, if a person should by his labour, or any other way in-

crease,

b For the law respecting Fishing, see book III. chap. 22.

c Black. Com. 404. *d* Ibid. 405.

steal, improve, or add to the property of another, without his consent and approbation, he cannot recover any satisfaction therefor, but if it be done by the direction, or consent of the proprietor, the labourer is entitled to an adequate compensation.

CHAPTER TWENTY-FIFTH.

OF TITLE TO THINGS PERSONAL BY CONTRACT.

THE title to things personal, may be acquired in three modes, by the act of the party in taking the possession of things in common, which is occupancy, and the original and ultimate foundation of all right : by the agreement or contract between persons for the purchase and sale of property, which is a derivative right : and by the operation of law, as in the cases of title by descent, marriage, and sundry others.

It is evident that individuals in the exercise of the right of occupancy and industry, in the cultivation of the ground, and in manufactures, must acquire a larger share of some kinds of articles, than are necessary for their own consumption, and a less quantity of others. This was the origin of traffic : and mankind by bartering and exchanging those commodities, of which they had a superfluity, for those in which they were deficient, supplied their mutual wants, and furnished each other reciprocal accommodations. But when society had become polished, luxury encreased, and a taste for the productions of remote countries introduced, it was found difficult to supply the multiplied, and artificial wants of mankind by exchange. This made it necessary to agree upon some particular article to be a *common standard*, to ascertain the comparative value of different commodities, and be the general representative of property. The permanent substance of metals, rendered them the most convenient for this purpose. They were therefore adopted as the medium of exchange, and an imaginary value was stamped upon them, by the consent and agreement of all nations. Money being established as the representative of property, facilitated the intercourse of the remotest nations, and the introduction of commerce, distributed every where, the elegant and useful productions of the

most distant parts of the earth ; and laid the foundation of the unequal division of property, by furnishing to the superior industry and capacity of individuals, those means of accumulating riches, which were unattainable by personal labour in the rude and unpolished ages of society. Gold and silver, instead of being considered as of mere imaginary value, were deemed to be wealth itself, and the riches of a country, were estimated by the quantity of those precious metals which it possessed. The discovery of America, opened to the avarice of mankind the rich mines of Mexico and Peru, and multiplied gold and silver to such an amazing extent, as greatly to lessen their value, and it is probable that the immense quantities that were in circulation, must have made it necessary to have introduced some other medium of commerce, had not the discovery of a passage by the cape of Good Hope, to the East Indies, opened an inexhaustible demand for the gold and silver, that issued from the bowels of South America. The luxury of Europe, and America, has introduced a high relish for the elegant manufactures, and the delicious productions of the East ; but the extreme fertility of this country, has rendered unnecessary the importation of commodities from other countries, for their own consumption, of equal value with their exports, and of course this balance can be discharged only by specie. The despotic governments of India, render the enjoyment of property precarious and insecure, and the proprietors frequently conceal their treasures in the bosom of the earth, for preservation. The knowledge of the place of concealment must frequently be lost, by the sudden or violent death of the possessor, and a variety of circumstances, resulting from the numerous and frequent revolutions of the government. It is an interesting speculation to the philosopher, to observe the numbers of unhappy wretches, that are buried in the mines of South America, incessantly digging for gold and silver, immense quantities of which, after circulating through many different countries, and being the subject of many negotiations, ultimately find the way to the East Indies, and there return again to the bowels of mother earth, never to be called again into circulation, unless by mere fortuitous discovery.

The adoption of money as a medium of exchange, and the introduction

duction of commerce, have in a great measure superseded the original mode of acquisition by occupancy, and have led the way to acquisition by contract. This opens to us a most extensive and important subject of enquiry. Contracts are the basis of all human transactions, and the mode by which property is transferred, and acquired, in the unbounded variety of mercantile negotiations.—The construction of contracts, the compelling of their performance, and the awarding of compensation for their violation, furnish the principal subject on which courts exercise legal, or equitable jurisdiction.

* A contract is defined by the Roman law, to be the consent of two or more, to the same thing.

f A contract is defined by the common law, to be an agreement upon sufficient consideration, to do, or not to do a particular thing. g A contract may be described, to be a transaction in which, each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other. In this definition and description, are included every feoffment, gift, grant, lease, loan, pledge, bargain, covenant, agreement, and promise; for contracts may be considered as the general name, and these are the several species of contracts. By the laws of all nations, the consent of the parties is the essence of the contract. But for the purpose of fully investigating this important branch of our disquisitions, I shall treat of it under the following heads,

1. Of the Parties to Contract.
2. Of the assent to Contracts.
3. Of the subject of Contracts.
4. Of the general nature of Contracts.
5. Of the Consideration of Contracts.
6. Of the Interpretation of Contracts.
7. Of the several species of Contracts.
8. How Contracts may be disannulled, rescinded, or altered.
9. How Contracts may be fulfilled.
10. How Contracts may be released.
11. How Contracts may be barred.

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* *Est pactio duorum pluriumve in idem placitum consensus.*— 1 Domat's civil law, 32. f 2 Black. Com. 442. g 1 Powell on Contracts, 6.

I. Of the Parties to Contracts.

All persons have the power of entering into contracts, unless disqualified by certain legal disabilities : but to ascertain what persons have a moral power to bind themselves by their contracts and agreements, we must consider the nature of assent. The term assent signifies the acquiescence of the mind to something proposed, or affirmed, and involves in consideration of law, first a physical power of assenting, secondly, moral power, and thirdly, a deliberate and free use of those powers. Therefore the absence of any of these capacities, in either of the parties, renders the person labouring under it, incapable of entering into an agreement to bind himself, or by virtue of his acts, others.

Idiots and lunatics, labour under a moral incapacity to assent to contracts. They are not governed by reason, but are influenced by an irresistible impulse like machines. All acts that are done by them, are absolutely void : but it seems to be a principle of the common law of England, that no man after the recovery of his senses, shall be admitted to stultify himself, and plead his own disability in avoidance of his contract ; because of the possibility that they may counterfeit such disability : *i* but by the practice of the courts in this state, they have established the doctrine, that a man may stultify himself in his own proper person, and may employ an attorney, and avoid his contract, by pleading his own disability, even at the time while he is labouring under the incapacity.

Drunkenness, may be considered during its operation, as a temporary insanity, yet as it is considered as a crime, and is of the party's own procuring, it will not be a sufficient ground to authorise a person to rescind his assent to the contract. Nor is it a reason for relief in equity, unless the person were drawn into such debauch by the management and contrivance of him who gained the contract, and then equity may relieve. So of a man's being of a weak understanding, is no objection to his assenting to a contract : for courts of law cannot examine into the wisdom and prudence of men, in their manner of transacting their concerns, and disposing of their estates. If a man therefore be legally compos, be he wise

b : Powell on Contracts, 11, 14. *c* Moffit vs. Davis, S. C. 1793.

or unwise, he has the absolute disposal of his estate, and will stand for a reason of his actions.

A person that is a lunatic, or non compos at times only, may bind himself by contracts, made during his lucid intervals.

* Infants are under a legal incapacity, to make contracts to their disadvantage. The rule to decide the validity of their contracts, is whether there be an apparent benefit or semblance of benefit upon the face of the transaction. If neither of these appear, the contract is void : otherwise voidable or not, at the election of the infant, when he arrives at full age. But it is not necessary that such assent should be express, it is sufficient that acts be done, from whence an assent must necessarily be inferred.

† A married woman during her marriage, is incapable of assenting to a contract, to be binding on herself, or her husband, for in consideration of law, she is under the dominion and coercion of her husband and consequently has no moral capacity to assent to a contract respecting his property, or her own. Persons under overseers, are by statute, rendered incapable to make contracts.

2. Of the assent to Contracts.

“ The assent to a contract, may be either express or tacit.— Express assent, may be manifested by some gesture, speaking, or writing—or in some instances, by acknowledgment before magistrates, and this may be either precedent, concomitant, or subsequent.

A tacit assent may arise in several ways, it may arise from inaction or forbearance of action. A man by his silence, in case he be present and knows what is doing, is presumed to give his assent to what is done, unless it appear that he was awed into silence or in any way hindered from speaking.

“ If a man make a lease to another, on good consideration, and afterwards make a lease to a third for the same time, and the first lessee assents in the bargain, and does not discover his lease, and it is not excepted in the second lease, which is upon good consideration, then the second lessee, will even at law be preferred. But to

justify

† Cro. Car. 502. 1 Pow. Con. 22. 1 Ibid. 59. “ Ibid. 131.
* Ibid. 132. 134.

justify the conclusion from a man's silence, that he has relinquished his right: two things are necessary, that he should know what belongs to him, is conveying to another, for where one forbears to act through mere ignorance, it shall not prejudice him, and that he should be voluntarily silent, tho he has full liberty to speak; for if there be any compulsion to hinder his acting, there is no ground from his silence to infer his assent.

3. Of the subject of Contracts.

• Under this head we are to consider the subjects respecting which, contracts may be made: and here a distinction is made between contracts, that are executed, and such as are executory. It is a general rule, that a man cannot by a contract executed, grant or convey any thing, in which he has not an actual or potential interest, at the time of the grant or conveyance, because it is necessary to enable a person to transfer property, to be himself the proprietor. Therefore all contracts executed, are void where the person making the conveyance, is not the owner at the time. As if a man should grant all the wool, which he should buy hereafter, this is a void grant, for he has not the wool, neither actually nor potentially.

• But where such contracts are executory, operating as declarations precedent, and to the perfection of which, some new act is necessary, to give them life and vigor, the law admits of them, tho made before any interest vested. As if a man covenant with another, to purchase a farm by a certain time, and give him a deed: this covenant would be binding, tho it be purchased after, because there is a new act to be done, the giving the deed. But if there be no new act to be done, it would be otherwise, as if a man should covenant with his son, in consideration of natural love, to stand seized to his use, of the lands which he should afterwards purchase, the use would be void: because here no new act is to be done, and the father did not own the land at the time of the covenant.

• The subjects of contracts must respect things that are possible to be performed, and therefore all contracts to perform impossible things are void. As a contract to build a large house in a day, to

• Pow. Con. 152. Plowd. 431. Hob. 132. p 1 Pow. Con. 158.
 7 Ibid. 160.

go to Rome in the same time, to drink up the sea, or to touch the sky with one's hand, or any such impossibilities, are all void : and the contracting party would not be subject to an action even for damages accruing by reason of non-performance. But a distinction must be made between things naturally impossible, which must be evident to all the parties at the time of contracting, and things which are not physically impossible, but the impracticability of the accomplishment arises from the circumstances and ability of the party contracting : for in the latter cases, tho' the contract cannot be fulfilled by reason of the inability of the contractor, yet he will be liable to pay damages for a non-performance. Thus where a person in consideration of two shillings and six-pence paid in hand, and five pounds to be paid on the performance of the agreement, contracted to deliver to another two grains of rye-corn, on the Monday following, and so on progressively, doubling the quantity on every Monday, during the year ; it was objected on an action of the case brought on this agreement, that it appeared on the face of it to be impossible, the rye to be delivered amounting to such a quantity, as all the rye in the world was not sufficient to produce. But the court determined, that if a man will for a valuable consideration, undertake a thing impossible with respect to his ability, that will not make the contract void ; for though the contract be a foolish one, yet it will hold in law, and the person contracting ought to pay something for his folly.

All contracts to do any acts that are repugnant to law, are void, because where the object of a contract is contrary to a man's duty, it may be presumed that he did not give his full assent, especially if it be to perpetrate a crime, and because the law by forbidding it, takes from the contractor the power of obliging himself to perform it, and consequently prevents the person contracting from gaining a right to require it to be done.

All matters against law are reducible to two heads, that is, things that are bad in themselves, and things that are bad because they are prohibited. Of the first kind are all contracts, that have for their object something forbidden by the moral law, as to commit murder, theft, perjury, and the like ; which contracts acquire no additional turpitude, from being declared unlawful by the le-

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gislature.

r Pow. Con. 161. f 2 Ld. Raym. 1164. f Fitz. tit. obhg. 13.

gillature. Therefore an obligation to pay a man a certain sum of money, if he will kill or rob another, is void. * So where the defendant's intestate gave to the plaintiff a bond, the condition of which was, that she should live with him in a state of fornication, and that he should leave her an annuity of sixty pounds a year; the bond was held to be illegal, and void.

w But if a man debauches a woman before chaste, or having seduced a woman before virtuous, gives her a bond as a recompence, or a provision for her support, it is premium pudoris, and good in law.

* Contracts that have for their object things that are bad, because prohibited, that is not bad in their own nature, as being repugnant to the moral law, but bad because they are against the law of the land, are of three kinds, because they are repugnant to the welfare of the state, or against some maxim or rule of law, or in contradiction to some positive statute.

All contracts are deemed repugnant to the welfare of the state, which have for their object, the restriction of trade in general, manufactures and husbandry. Thus, contracts that a man should not exercise trade, or set up manufactures, or that a farmer should not sow his land, militate against national policy, and are void.—

y But an agreement upon good consideration, not to exercise a trade in a particular place, will be good; but if it be without consideration, it will be void.

* A contract for lawful maintenance, or upholding a suit, is against law, and void. An obligation entered into with an alien enemy, has been held to be void, on the ground that such communication with the enemy may endanger the public safety.

* All marriage brokerage bonds, given for assistance in promoting marriage, are void, because they militate against the general welfare of society.

b All contracts and agreements, the objects of which militate against the principles of morality and public decorum, as is the case with all such as are entered into, to give effect to corrupt purposes

* 3 Burr. 1568. *w* 3 Will. 339. * 1 Powell Con. 166. *y* Cro. Jac. 596. *z* 2 Inst. 212. * 1 Powell 174. *b* Ibid. 183.

purposes, are void : because they are repugnant to the welfare of the state, and against that rule of law, which prohibits every thing that is contrary to good manners. c Therefore if a person who wanted an office, conversing with a person who had most influence to obtain it, should bet a considerable sum with him, that he would not obtain the office, such a wagering contract, tho innocent in itself, if unaccompanied with any sinister view, yet being a mere color to disguise the real intention of the party, namely, to purchase the office, which is an illegal act, the contract would be corrupt and therefore void. Upon the same principle, a wager entered into merely as a color to cover usury, cannot be recovered by an action at law, for the moment that the truth appears, the contract, whatever shape it may assume, will remain to be governed by the same rule, as if the parties had expressly entered into the illicit and corrupt agreement.

d If a wager be laid, with one of the judges who are to decide upon a cause, respecting the decision of it, this would operate as a bribe, and nullify the contract. So if a wager be laid with a counsel or attorney on the adverse side, as this would be to induce him to act treacherously in the cause, the contract would be void. e But a wager laid between a plaintiff and defendant, in a case whether a decree or judgment of the court be reversed or not, on an appeal, the parties being upon equal terms, and the contract entered into without fraud, was held to be a valid contract, as not being prohibited by positive law, nor against any principle of sound policy, nor against any legal maxim.

f All contracts that have any fraudulent object in view, are upon the same ground, void both in law and equity. A contract made with a view to defraud the government, would be void.—

g These principles extend to all contracts of an unfair nature, in respect of their influence on third persons, altho otherwise, as between the parties to them, because if their object be to impose upon third persons, the parties to them cannot have a remedy in law or equity, for they are immoral. Thus if a man attend at auctions, to enhance the price of goods, he cannot support an action at law, to recover a compensation.

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All

e Cowp. 37.
g 1 Powell, 168.

d 1 Powell, 184.

c Cowp. 37.

f Douglass, 450.

b All contracts are void that respect things which are prohibited from being the object of contracts by statute, as in the case of usurious contracts for more than lawful interest.

i All contracts are unlawful which are intended to induce an omission of something, the doing of which is a duty, in the person with whom it is made. Thus if a sheriff should make an undersheriff, provided he should not serve executions above twenty pounds, without his special warrant, this proviso or agreement is void: for tho a sheriff may do as he pleases in appointing an undersheriff, yet if he does appoint one, he cannot abridge his power.

j A contract or agreement, is unlawful that is intended to encourage unlawful acts or omissions. Therefore if the proprietor of a newspaper give the editor a bond of indemnity, against any indictment or action, to which he might thereafter be subjected, by reason of publishing libels or the like, such bond will be void. So a bond to save harmless a sheriff for embezzling a writ, would be void.

k Contracts that have a tendency to encourage unlawful acts, are void. As a wager between two people, that one of them, or a third person will beat another, is void, because it is an incitement to a breach of the peace. So if the subject matter of a wager were the violation of chastity, or an immoral action, as if one betted that he could seduce such a woman, such contract would be void, because it is an incitement to immorality.

l All contracts, which in their object, wantonly affect the interests of third persons, or their feelings, and thereby disturb the peace of society, will be reprobated in a court of justice. *m* Therefore a wagering contract, that a woman has committed adultery, or that an unmarried woman has had a bastard, will be void. For the law will not permit third persons, for the purpose of laying a wager, wantonly to expose others to ridicule, and libel them under the form of an action. *n* So it has been determined, that no action will lie upon a wager, between indifferent persons, respecting the sex of a certain person, for they shall not be permitted

b 1 Powell, 186. *i* Ibid. 195. *j* Ibid. 196. *k* Ibid. 198. *l* Ibid. 232.
m Coup. 732. *n* Ibid. 729.

to try by a wager, whether he is a cheat or impostor, and call upon his friends and confidential attendants to give evidence, to expose him.

o An action upon a contract that wantonly tends to introduce indecent evidence will not be retained in a court of justice. As if a wager were laid, that a woman had a peculiar defect, in a particular part of her body, or that such person was an hermaphrodite, or had a particular disorder, or as to the cause why a woman did not breed, or the like.

p But here it must be observed, that the contracts and agreements respecting things, which the law prohibits to be the subject of contracts, create no right, and consequently occasion no obligation on the other side, yet the law suffers them in some instances, after they have been carried into execution to stand contrary to its prohibition; for being executed they are valid between the parties, tho the law will not give its aid to either party, to carry them into execution. As for instance, if I game with a man contrary to law, and lose, and pay him the money, I ought not to have recourse to an action, to recover the money, if there be no cheat put upon me by him that has won it.

q But here a material distinction is to be made between the different sorts of contracts, which are prohibited by law. First, such as are founded upon reasons of policy, and public expedience, as where the act is in itself immoral, or a violation of the general laws of public policy. Secondly, such prohibitions as are intended to protect weak, or necessitous men from being over-reached, defrauded, or oppressed—In the former cases both parties are deemed equally guilty, and in the latter only one of them. The law therefore in the former cases, allows no action for the relief of the party who has performed his part, after he has assented with full, and entire liberty, r for it is a general maxim that where the parties are equally criminal, the condition of the possessor is best, and that to him who is consenting there is no injury. Therefore if one pay money fairly lost at play, he cannot recover it back; so if one pay money as a bribe, he cannot recover it in an action, for both parties are equally criminal.

s But where contracts or transactions are prohibited by positive

o 1 Powell, 233. p Ibid. 200, 201. q 2 Burr. 1012. r In pari delicto melior est conditio possidentis—Volenti non fit injuria. s 1 Cowp. 701

tive statute, for the sake of protecting one set of men against another, the one from their condition, and situation being liable to be oppressed, and imposed upon by the other, then the parties are not equally criminal; therefore the person injured after the transaction is finished, may bring his action, and defeat the contract. For instance, by the statute of usury, the taking more than six per cent. being declared illegal, and the contract void, the borrower if he pays the illegal interest, may recover the excess of interest on an action: for this statute was made to protect needy and necessitous persons from the oppression of usurers, and mortgaged men, who are eager to take advantage of the distress of others, whilst they on the other hand, from the pressure of their distress, are ready to come into any terms, and with their eyes open, not only break the law, but compleat their own ruin.

▪ If the illegal contract remain in an executory state, and be not performed, then if the party who has paid money, as a consideration for something to be done wishes to rescind his contract, he has the power to do it; for so long as nothing is done by either party, each is at liberty to recant, because it is to be presumed, that they have not acted with mature deliberation. As if a merchant has promised another to furnish him with contraband goods, and they agree for a price, either may refuse to stand to his bargain, which they ought not to have made. But then it must be done on the terms of restoring the party to his original situation. So where a sum of money was paid to another, to procure a certain office, and it had not been procured, the party who paid the money recovered it back in an action, because the contract remained executory.

▪ If the subject of a contract, or agreement be evidently useless, or tending to no consequence if carried into execution, this will render it void. And the motive to consider it so, is still stronger, if it be of such a nature, as if performed it brings no loss, or prejudice to the party stipulating it, and if fulfilled will create trouble, or damage to the performer; because engagements of this kind produce no obligation: for how can a man have a right of requiring me to put myself to any charge, toil, or trouble in do-

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† Doug. 471.

▪ 1 Powel, Con. 231

ing a thing, which shall profit him nothing, and it is indeed against reason to undertake an action which can produce no good, and may produce evil. As if a man had agreed not to wash his hands, or comb his head, or change his linen, for a certain time, or to abstain from eating several days, or the like.

• Contracts are void which are made on Sabbath or Lord's day. From sundry adjudications, it appears to be the opinion of the courts, that the transaction of secular business, is unlawful only during the time, from morning light till evening; and that the law does not extend to the solar day. A note executed about noon on the Sabbath day, has been declared void. Notes executed on Saturday evening, and at two o'clock on Sunday morning, have been held good.

4. Of the general nature of Contracts.

• Contracts or agreements, are divided into executed and executory. A contract or agreement is said to be executed, where two or more persons make over their right to another, and thereby change the property, either presently and at once, or at a future time, upon some event that shall give it full effect, without either party trusting to the other; as where things are bought, paid for, and delivered, or where a man has land, under some engagement, and disposes thereof, at the time such engagement ceases. Contracts executed, do not in general retain the name of agreements, but are denominated by some particular term, applicable to their nature. As a sale, grant, lease, assignment, mortgage, and the like.

Executory agreements according to the ordinary acceptance of the term agreement, are such contracts as rest on articles, memorandums, parol promises, or undertakings, and the like, entered into, preparatory and introductory of more solemn, and formal alienations of our property, and free agency. All promises to give, grant and sell, belong to the former class, and all promises or undertakings to do or suffer, belong to the latter class. A contract therefore, is said to be executory, either when one party performs, and the other is trusted, as a loan of money, on a promise

• Vail vs. Mumford. S. C. 1789.

• 1 Powell, Cont. 234.

mise to secure it by mortgage of land : or when neither party performs and each trusts to the other, as a promise to take in charge in respect of a premium to be given, or a covenant, to make a lease, in consideration of a sum to be paid for it. Contracts or agreements are applicable to all rights, real, personal or mixed, which may lawfully become the subject of traffic.

All contracts and agreements, whether executory or executed, may be branched into the following divisions. First, contracts are either express, constructive, or implicative. Secondly, contracts are simple and absolute, or conditional. And thirdly, contracts may be written and unwritten.

1. Contracts may be said to be express, where each party stipulates in direct, positive and explicit terms, the thing that is to be done or omitted.

Contracts or agreements are constructive, where the law in expounding the instrument which contains the contract, raises a contract of a different nature, from that, which at first view the instrument imports. As a recital in articles of marriage, that whereas the defendant was to pay to the plaintiff, one thousand pounds for the marriage portion of the wife, the plaintiff covenanted to make a certain settlement : here the recital of the agreement was held good, to support an action of covenant. And the reason of this general rule is, that where persons are agreed on a thing, and words are expressed or written, to make the agreement, altho they are not apt and usual words, or whether they proceed or not, from the proper party, yet if they have substance in them, tending to the effect proposed, and the proper party agrees to them, the law will give them effect by construction, according to the intent and common use of such words. For the law always regards the intention of the parties, and will apply the words to that which in common presumption may be taken to be their intent ; and the agreement of the minds of the parties, is the only thing the law respects in contracts, and therefore, such words as express the intent of the parties, and have substance in them, are sufficient.

Therefore, if a man be bound in an obligation, which is indorsed,

ed, that the obligee wills and grants, that if the obligor stands by the arbitrament, judgment, and order of certain arbitrators, then the obligation is void : it is no ground of objection, that the words are the words of the obligee and not of the obligor, but the condition is good : for there is the substance of a condition, and the intent of the parties appears.

Implicative contracts are such as do not arise from the special agreement of the parties, but arise by the operation of law, out of the circumstances of the case. As where a person receives money to my use, or to deliver it over to me, he is chargeable as a receiver, and the law implies a contract, that he will pay it over to me. So where a man has by any means the custody of the goods of another, the law implies a contract by which he is bound to take care of them, according to the nature of his bailment. If a man deliver stuff, or other wares to another man's wife, knowing her to be married, without the husband's privity or allowance, it is a gift to the wife, and the husband is not chargeable. So the law implies an agreement, that the grantee of one thing, shall have every other thing necessary to the full enjoyment of what is granted.

2. * Contracts and agreements, are simple and absolute, or conditional.

A contract or agreement, is said to be simple and absolute, where one party obliges himself positively and without condition, to the performance of a certain thing, which the other party may require to be carried into effect. As if a man in consideration of a certain sum of money paid in hand promises to build me a house by a certain day, this is an absolute contract, and I may sustain an action upon it if violated.

A conditional agreement, is where the obligation is in some respect made to depend upon some particular and uncertain event, or at least an event uncertain at the time, in the minds of the contracting parties.

As if a man agree to give another a thousand pounds, if he

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B b b

* marry

marry his daughter, here the obligation is suspended, till the event stipulated, takes effect, and if it does not happen, disannuls it.

y Conditions may be said to be lawful and unlawful. *z* The effect of unlawful conditions vary according to the nature of the contract, and the condition. If a man be bound in a bond upon condition, that he do an unlawful act, the bond is void. But if I deliver a man property, to be his, upon condition that he do an unlawful act, the estate is absolute and the condition void. In both instances, the law aims at the same object, namely, the preventing the crime. In the former case, lest the obligee should have any temptation to commit the crime, the law frees him from the penalty of the bond; and in the latter case, vests in him the property without performing the condition.

a All conditions repugnant to the nature of the contract, are void. If a man sells another land, upon condition that he shall not alien, or take the profits, the condition is repugnant and void. But a covenant or bond, upon the same condition, will not be void; because this is not a total restraint of alienation, or taking the profits: and therefore he has the property of the land, tho liable to incur a forfeiture of the covenant, but in the other case, he cannot be said to take the estate.

Lawful conditions may be either possible or impossible.—Possible conditions, are such as accomplish the contracts, that depend on them, as if I agree with the bailee of my property, that on paying me a certain sum, the property shall vest in him, or such as dissolve a bargain, as if a lease be made with a condition to be void, if the lessee under let, become bankrupt, or the like, or such as alter the contract, as if one agree, that if six per cent. (being the interest due on a mortgage) be paid in three months after it became due, the interest shall abate to five per cent.

b Impossible conditions may be divided into such as are so, at the time of making the contract, and such as become so, by subsequent matter: and such impossible conditions have different effects on contracts. For instance, if a condition possible at the time of making thereof, but becoming impossible by the act of God, be annexed

y 1 Powell, 261. *z* Co Lit. 206. *a* Cro Jac. 596. *b* Co. Lit. 206.
1 Powell on contracts 263.

nexed to a contract executed, as the delivery of a horse or the like, the right of such person in the horse shall not be avoided thereby : as if a man deliver another a horse to be his, on condition that the person to whom it is given shall perform some personal service for the giver : yet if he die, so that it become impossible by the act of God, to perform the service, the property of the horse becomes absolute. But if such condition be annexed to an executory contract, as if there be a bond of recognizance or the like, with condition, that the obligor shall appear the next term in such a court, if before such day, the obligor die, the recognizance or obligation is saved. And the reason of this diversity is, because the property in the horse vested by the contract executed, and could not be defeated, unless by some subsequent matter. But the bond or recognizance is a thing in action and executory, whereof no advantage can be taken, until there be a default in the obligor. And therefore in all cases, where the condition of a bond, or recognizance, is possible at the time of making the condition, and before the same can be performed, the condition becomes impossible by the act of God, or the law, the obligation is saved. But if the condition be impossible at the time of making the obligation, the condition is void, and the obligation is single, and stands good. As if the condition should be, that the obligor should go a hundred miles in ten minutes, it is impossible and void, and the obligation binding.

c But a distinction is made upon bonds, recognizances, and executory contracts, where the impossible condition is part of, and incorporated with the bond, recognizance or contract, and where it is indorsed or underwritten, for in the former case, the instrument becomes void, but in the latter case the conditions become void, and the obligation or contract is good.

d We must distinguish between conditions annexed to contracts and agreements, circumstances annexed, which seem to import conditions, that which are modal only, neither disannulling, suspending, or altering the obligations of them, but only respecting the manner of performance : as that an agreement shall be performed on a certain day, or in a certain place. Thus if two

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c 1 Salk. 172. *d* 1 Powell, 267,

persons enter into a contract for the sale of an estate, and the conveyances are agreed to be made, and the purchase money paid at such a place and time. The obligation of the agreement, binds the parties, from the moment it is entered into, and the time and place are only circumstances that affect the performance, of the engagement. Such statements do not imply conditions, whereby the parties are to be considered as contracting on the ground of a strict compliance, but are mere circumstances that admit of compensation, and if either party fails to comply, an action will lie against him, for the recovery of damages.

3. Contracts are written or unwritten. Written contracts are rendered necessary in certain cases by the statute of frauds and perjuries—but this subject will be fully investigated in some future part of our enquiries.

5. Of the consideration of Contracts.

* A consideration is the material cause of a contract or agreement, or that in expectation of which, each party is induced to give his assent, to what is stipulated reciprocally between both parties. It is a general rule, in all cases where the contracts are reduced to writing, they are executed with such solemnity and deliberation, that a sufficient consideration shall always be presumed, and in an action upon a written contract, there shall be no enquiry at law, into the consideration of it, because it is sufficient to say that such was the will of the party contracting. It is clearly agreed at common law, that bonds and all instruments under hand and seal, are conclusive upon the parties, they cannot plead a want of consideration, and no enquiry can be had into the consideration. *f* Sir William Blackstone, in his commentaries on the laws of England, lays down the same doctrine, in respect of notes of hand. *z* This doctrine is controverted by Mr. Powell, in his essay on contracts. He asserts, that while the note is confined to the parties, who fabricated it, the want of a consideration, is a clear bar against a recovery upon it, on the ground of its being a nude pact, or naked agreement : and that the law prohibits no enquiry into the consideration, till it has been negotiated, and third persons

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e 1 Powell, 230.

f 2 Black. Com. 446.

g 1 Powell, 340.

have become interested in it. But as by our law, promissory notes are deemed specialties, and of as high a nature, as bonds under hand and seal, there can be no doubt, but that the sufficiency of the consideration is as evident in a note of hand, as in a bond : and the party shall not be allowed to deny what he has acknowledged by his own deed. The principle adopted by our law, respecting notes of hand, clearly destroys all distinction between sealed and unsealed contracts : and therefore it may be considered as a necessary consequence, that it is not the sealing, but the writing of the contract that stamps upon it the solemnity, which precludes an enquiry into the consideration. Upon the same principle, therefore, all other written contracts shall be deemed conclusive on the parties, without enquiring into their consideration.

b But tho the law admits no enquiry respecting the consideration of contracts, reduced to writing, on the principle, that no consideration is necessary to substantiate such contracts, yet when the actual consideration of a written contract, was against law, by which it was rendered void, the law will admit the party to prove such illegal consideration for the purpose of avoiding the contract.— Thus, if I execute a bond or note, to a person for a consideration, that he commits some crime, the bond is void, and courts of law will so far look into the consideration of bonds, or notes, as to allow the party, to set up such illegal consideration to avoid the note.

So if there be a fraud in obtaining a note, without consideration, it is void. *i* As where a person gave a note with another, as surety for his debt, and the promisee cut off the name of the actual debtor, and then by affirming, that the note was not discharged or paid, obtained a new note of the surety, upon the promise to deliver up to him the first note, and then delivered it to him, with the name of the debtor cut off. For this fraud, the note was considered void, and no recovery was had.

j But in all cases of unwritten contracts, it is necessary that a consideration exist : for as words are frequently spoken by men unadvisedly, and without due deliberation, the law will not bind a man to an executory contract, entered into by words only, if it

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b 1 Black. Rep. 445.
ell, Con. 330.

i Reynolds vs. Bird, S. C. 1791.

j 2 Pow-

be not founded on good and valuable consideration. Therefore if a man buy of me a horse or other thing, for money, and no money be paid nor earnest given, nor day set for payment, nor the thing delivered, here no action lies for the thing sold, or for the money, but the owner may sell it to another if he will, for such promises or contracts are considered as nude pacts, there being no consideration, or cause for them, and it is a rule of the Roman law, of the common law, and of common sense, & that from a nude pact, or naked agreement, no action arises.

I shall consider what considerations are sufficient to support contracts. And first, a consideration may arise from some act to be done by one party, for the benefit of the other; and any thing however trifling to be done by the plaintiff, will be a consideration sufficient to maintain an action: and secondly, a consideration may arise, or be created, by doing or permitting something to be done, to the prejudice or loss of one of the parties. So that it is not absolutely necessary, that the consideration of the contract, imports some gain to him, that makes the contract: but it is sufficient, that the party in whose favour the contract is made, foregoes some advantage or benefit, which he might otherwise have taken or had, or suffers some loss in consequence of placing a confidence in another's undertaking. Thus, if a carpenter promise to repair my house, before a certain day, and he does not do it, in consequence of which, my house falls, I may have an action against him for the damages.

If a consideration is executed, and does not go along with the contract, but is entirely past, and the contract merely subsequent, it is not a good consideration. As a promise to pay a certain sum, or do a certain thing, in consideration that a person had built a house, or discharged a trespass, is not good, because it appears that the consideration is perfectly past, and no incident thereto, to continue it: so a promise to indemnify a person who had bailed my servant, is void. But where the consideration of a contract is executed, yet if there be an existing duty, it is valid. As if I am indebted to a person for building a house, or for damage done by trespass, or if a person bailed my servant at my request, then the

Ex nudo pacto non oritur actio.

I 1 Powell, 343.

existing
m. luid. 396.

existing duty validates the consideration of the contract. So if the consideration arise from a prior moral obligation, as a promise to pay a debt barred by the statute of limitations, or contracted during minority, this is a good consideration, and is not a nude pact.

The law does not require that the quantum of consideration shall be mutually equivalent : but there must be a something, for a something, and any advantage or loss, however trifling, will substantiate a contract at law : but idle, and insignificant considerations, are looked upon, as none at all ; for whenever a person promises without a benefit arising to the promissor, or loss to the promisee, it is considered as a void promise.

n In executory contracts, if the agreement be that one shall do a certain act, and that the other shall pay him a certain sum of money therefor ; here, tho the considerations be mutual, yet one is to be performed before the other, and therefore the act to be done, is considered as a condition precedent, and the party who is to pay, is not liable to an action, till the thing contracted to be performed, is done. *o* But if a day be appointed for the payment, and the day is to come before the thing can be performed, an action will lie for the money before the thing be done ; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. Where a day certain is appointed for the payment, after the thing is to be performed, the performance is a condition precedent, and must be averred in an action for the money ; for every bargain ought to be performed according to the intent of the parties, and when one relies upon his remedy, it is just that he should be left to it, according to his agreement : but there is no reason that a man should be obliged to trust another, contrary to his intention : and therefore if two men should agree, one that the other should have his horse, the other that he would pay ten pounds for him, no action will lie for the money, till the horse be delivered.

p But when the considerations are mutual, and the promises separate ; as if another, in consideration that I promise to do a certain thing, promises to do another thing for me, or to pay me money at a certain day ; here I need not alledge that I had performed

n 3 Salk. 95. *o* Jones 218. *p* Hob. 82.

formed what I had promised, but I may have an action against him, for his not performing his promise to me, because the consideration, and foundation of his promise to me, was the promise I made to him ; it is promise for promise, and that is the consideration, and not the performance, and each party has a right of action against the other for non-performance. And it is a general rule, that when the defendant has a remedy for the consideration of a promise, that consideration need not be averred to be performed. So if one covenants to marry another's daughter, and he covenants to give him one hundred pounds, either party may bring an action against the other, without averment of a performance on his part. *p* But mutual promises must be both binding, as well on one side, as the other, and both made at the same time, or else they will be naked agreements : but to this rule there is an exception in the case of minors, for these where there are mutual promises, tho the minor be not bound, yet the adult is.

A valuable consideration to support a contract, is work done, money paid, marriage or the like. A good consideration is that of blood or natural affection, between near relations, the satisfaction accruing, from which the law esteems an equivalent for whatever benefit may move from one relation to another. *q* The common law in some cases considers the intrusting a thing with another, and his undertaking respecting it as a consideration in itself, for a faithful discharge of the trust : and therefore tho an action will not lie, for not doing a thing where there is no consideration to uphold a contract, to do it, yet where there is a delivery of goods to a person, who undertakes to carry them, or do something about them gratis, an action will lie on this bailment, if there be a neglect in the management, by which the goods are spoiled. So if I promise another to keep certain goods safely, till such a time, and afterwards refuse to receive them, no action lies : but if I take them, and they are afterwards lost or injured by my negligent keeping, an action lies.

6. Of the interpretation or construction of contracts.

r Construction, is the drawing an inference by the aid of reason,

p Salk. 21. *q* 1 Powell, 364. Ld. Raym. 909. *r* 1 Powell, 370.

as to the intent of an instrument, from given circumstances, upon principles deduced from men's general motives, conduct and actions. The intent of the parties, is to be gathered from the external signs and actions. For no man may put a construction upon his words contrary to the common understanding. Therefore he who has an obligation in his favour, has a right to compel him, from whom it is due, to perform it in that sense, which corresponds to the ordinary interpretation of the signs made use of.

In the case of express words, the general rule is, that they must be understood in the most known and proper signification, unless there be the most decisive reasons which lead to conjecture the intent was otherwise. We are not merely to regard the grammatical construction, which relates to the etymology and original of words ; but that which is common and most in use ; for use is the judge, the law, and the rule of speech.

Where words used in a contract expressive of quantity, or the like, have different significations, in different places, they will take effect as they are understood, where they are spoken.—Where words are equivocal, or sentences ambiguous, and capable of several significations, conjectures are necessarily resorted to, for the purpose of discovering the genuine intent of the parties : and in searching for such intent, our conjectures must be guided by the subject of the contract, the effects resulting from it, and the circumstances attending it. But where the obscurity and ambiguity of the terms of a contract, cannot be cleared up by the intentions of the parties, discoverable by the rules of exposition, then the construction ought to be against him, who ought to have explained it himself, or made the other have delivered himself fully. And therefore, he in whose favour the obligation is, ought to speak clearly, or otherwise, the other party has a right to explain the clause to his own advantage. But where the intent of the parties cannot be ascertained by the signs they use, or the contract is inexplicable, or uncertain, it is void.

In all contracts and agreement, the executors of the contracting parties, are implied in themselves, and without naming, if

from the nature of the contract, it appear that the parties so intended.

If money is to be paid by reason of a contract, the terms shall be understood and accepted, according to their import, where it is to be received ; that is, it shall be paid in currency there. So if a man advance money by way of loan, or if another detain his money unlawfully, by reason of which, he becomes entitled to interest, that interest should be according to the value of forbearance, in the country where the transaction arises. If the value of a thing be expressly stipulated in any contract, the value of the thing shall be intended, as things are at the time the contract takes effect. As if rent be, to be paid at a given time, at which time, a shilling is of the value of twelve pence, and it afterwards become only of the value of six-pence, as was frequently the case in former times, if the money be tendered at the time, the lessor shall not afterwards recover any more shillings, than would have paid the rent, at the rate of the money when the rent was due, and tendered. So if one be to pay on such a day, five quarters of corn, and at the day the contract was made, it was valued at fifty pounds, and at the day of payment, five pounds, he would be entitled to five quarters of corn, or five pounds.

This rule has been recognized by the courts of law in this state, and in all instances, upon actions brought upon some contract, for the payment of some collateral article, the rule has been to assess the damages, according to the current value of the article, at the time of payment. The same has been the rule, respecting notes given for any of the public securities of this State or of the United States : to ascertain the value at the time, when payable, and render judgment for that sum. If the contract be made payable on demand, it is considered as due instantly, and the date of the contract has been the period at which to calculate the value of the securities.

Several deeds made at the same time to effect one object, will be construed as one assurance, but so that each shall have its distinct operation, to carry on the main design.

Hitherto

Hitherto, I have been guided in my researches upon contracts, by the essay of Mr. Powell, on that subject, and where it was to my purpose, I have transcribed literally from him, without any attempt to vary his expressions. On mature attention, it is evident that he has fully investigated and exhausted the subject, and has every where expressed himself with that conciseness, perspicuity, and energy, which is to be expected from a writer of first rate genius. As there can be no pretention to originality in a compilation, and as the whole merit consists, in detailing the sentiments of others with fidelity and accuracy, I consider it vain to torture the imagination, to find new expressions to convey the sentiments of that writer, when his style is so perfect and correct, that it would be idle to attempt to improve it.

7. Of the several species of contracts.

We have treated of the general principles respecting contracts, and come now to consider more minutely the several species.—The several kinds of contracts, by which personal estate is transferred, are sale and exchange : bailment : hiring and borrowing : and debt, of each of which, I shall treat at large.

1. *f* Sale and exchange, are the most usual and general mode of transmitting and transferring property from one to another. This may be considered a contract executed, and takes instant effect, by the immediate delivery of the thing. The difference between a sale and an exchange, is this, the delivery of one article of goods for another, is an exchange : and the delivery of goods for money, is a sale : but the same general rules of law, govern each kind of conveyance. A sale of personal estate, is founded on the consideration of some price, that is paid for it, or the value of some article given for it. There must be some consideration to constitute a sale. It is not however requisite, that the consideration be of equal value with the thing purchased : for an actual consideration, however trifling, substantiates the sale between the parties.

It is a general rule, that the owner of things personal may dispose of them whenever he pleases. And let him be ever so deeply involved in debt, or embarrassed with executions, yet a bona fide purchaser

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for valuable consideration, shall hold the estate against creditors. In this respect we differ from the English law, for there when the execution is delivered into the hands of the sheriff, the goods of the debtor are holden to answer the debt, and a sale shall be deemed fraudulent.

An effectual sale and transference of personal property, is made when the parties have agreed on the price, payment is made and a delivery of possession given. No sale can be made without an actual payment or an express agreement for the payment at a future time. If a man asks six pounds for his horse, and another agrees to give him that sum, this is no sale : but if he pay down the money, or the owner agrees to take a note, which is given, or to wait for the payment, till a future day, then the bargain is completed and the property of the horse transferred. Therefore, when the owner fixes on a price, and agrees that he will take that sum, and the purchaser agrees that he will give such price, it is a bargain, and neither party can recede, provided immediate payment or delivery be offered : but if no payment or delivery be offered, and nothing further be done, the bargain is considered of no force and does not bind either. But when the parties have agreed on the price, and any part be paid and received as earnest money, the contract is effectual, and the property is transferred from one and vested in the other, and they have full power to carry the bargain into effect. One may demand the thing sold, and the other the residue of the price.

It is very customary in the sale of personal property, to make an actual, and formal delivery of the thing sold, in the presence of witnesses called for that purpose. This is a prudent practice, and renders such sales evident with the clearest certainty, and proveable with the greatest facility. But such formal delivery of possession is by no means necessary to constitute a conveyance. It may therefore be considered as a general rule, that a sale is effectual, and valid, when the parties have agreed on the price, and the payment is actually made, or an agreement with respect to the payment, be made. If it be manifest that it is the intention of the parties to bargain, that one sells and the other buys, it is sufficient without any formal delivery of the possession of the article. Thus if a man
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tells me, that the price of his horse is ten pounds, and agrees to take that sum, and I agree to give it, or to give my note payable at a future time, and he consents to take it, here upon my paying the money, or executing the note, the contract is effectually compleated without delivering the horse to me. I may maintain an action against him for the horse. If the horse should die after compleating the bargain, and previously to my taking possession, I must sustain the loss; for as soon as the bargain is made by agreeing on the price and payment, the property is transferred from the seller to the buyer, and the seller becomes entitled to demand the price, and the purchaser to demand the horse. The purchaser however must not take the horse, without offering the price agreed on, and the seller, if he refuses to deliver the horse, when the price is tendered, is liable to an action. But where there is a proposal to bargain, or where there is a mere agreement as to the price, and nothing further is done, the bargain is incomplete, and either party is at liberty to do as he pleases.

On the sale of goods, if earnest money be paid by the purchaser, or part of the goods be taken away, he must pay the residue of the money, upon taking the rest of the goods, because no other time is appointed. The earnest money binds the bargain, and gives the buyer a right to demand the goods; but a demand without paying, or tendering the residue of the money is void. When the seller has taken earnest money, he cannot afterwards dispose of the goods, unless there be some default in the buyer. Therefore if he does not take away the goods, and pay the money, the seller ought to request him to do it: if he then neglects to do it, in a reasonable time, the seller may consider the bargain as dissolved, and dispose of them to whom he pleases, or he may tender the goods to the buyer, and demand of him the residue of the money. The seller must keep the goods a reasonable time for delivery; but where there is no time appointed for the payment of the money, or delivery of the goods, it is generally implied, that the delivery shall be made immediately, and the payment on the delivery.

No person can dispose of personal estate, unless he be the owner, or be thereto authorized by the owner. Thus, if a man
either

either lawfully or unlawfully gain the possession of my estate, he cannot by any sale divest me of it, without my consent. Thus, if I lend or hire my horse to a man to ride, or trust him in his possession to pasture, he cannot dispose of the horse, nor is he liable to be taken for his debts. If a man steal or tortiously take my horse, he cannot sell him, but I have a right to take him wherever I can find him. If he should pass through sundry hands, I have a right to demand him of the possessor, and if he refuses to deliver him up, I can maintain an action against him, and so I may against any of the persons through whose hands he has passed, however honest they may be : and the person of whom I recover, if an honest purchaser, must look to him of whom he purchased for his recompence ; for the law will not suffer any man's property to be transferred without his consent. The purchaser therefore, must take care, that the person of whom he buys, be the lawful owner, for if he be not, he must risque the consequence. Therefore, if I lend the use of my property to a poor neighbor, for an honest purpose, I am secured by law against his selling it. But if a person will trust his property in the hands of a bankrupt, for the purpose of enabling him to cheat and defraud, he shall be concluded by the act of the bankrupt. If the owner be present, and sees another dispose of his estate, without informing the buyer, such silence shall be construed to be a tacit acquiescence in the sale. But if he be not present or knowing to such sale, he is not bound by it. In all cases, it is prudent and reasonable for the owner of the property, if he is acquainted with the transaction, to forbid it and make known his claim ; especially where an officer levies an execution upon the estate of one man, as belonging to another, so as to prevent any presumption or implication of consent. If a man suffer another to have the custody of his property, as a horse for example, and permit him to make sale, and the purchaser for some time has him publicly, without any claim from the original owner, this shall be deemed an assent to the bargain, and he shall be precluded from making any demand of the horse from the purchaser. In England the sale of things in fairs, and markets overt, bind the owner, but here the law is otherwise.

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* All sales of personal as well as real estate, made with an intent to defraud creditors, are void as to them, by the common law, as well as by statute. *u* It has been determined, that where a man in failing circumstances, makes over his property to one of his creditors, to pay his debts and return the surplus, it is putting his estate out of the reach of legal process and taking it out of the management of the law, and is a fraud.

u A fraudulent conveyance or gift, to deceive or defraud one creditor is void against all : but fraudulent conveyances, can never be construed, to be fraudulent, only with respect to real creditors, and purchasers for a valuable consideration, but shall bind the parties and their representatives.

As fraudulent sales are usually conducted in such a manner, as to render it difficult to obtain express and direct proof, courts have been obliged to admit certain presumptions, to detect such dishonest transactions.

* The characters or badges of fraud in sales and conveyances, are, 1. Where the conveyance is general comprehending all a man's estate, without exception, which cannot be presumed to take place, without a good understanding, that the seller shall have some part of his support. 2. Where the seller remains in possession, for this is the best evidence of property. 3. Where there was a secret manner of transacting the sale, with unusual clauses in the conveyance, as that it was made honestly and truly, which artful appearances are marks of collusion and fraud. 4. Where there is a secret trust between the parties, to permit the seller to use or have some advantage of the goods.

2. Of bailment. *y* This is defined to be a delivery of goods upon trust, to another person, to keep for certain purposes ; being sometimes for the use of the bailor, sometimes for the use of the bailee, and sometimes for a third person. Bailment is in all cases, where goods are to be delivered into the hands of another, without transferring the property, and the law always implies a contract, that the bailee will take care of them according to the nature of the bailment. There are six kinds of bailment, which I shall consider

* 3 Co. 83. Co. Lit. 290. Statutes 87. *u* Franklin, vs. Larrabee, S. C. 1793. *u* 5 Co. 60. Cro. Jac. 270. *x* 3 Co. 81. Moor, 638. *y* 2 Black Com. 451.

consider separately, for the purpose of understanding the subject clearly, first remarking, that the law respecting bailments is principally derived from the Roman jurisprudence.

z A bare naked bailment of goods, is where they are delivered by one man to another to keep for the use of the bailor. In this case, the law implies a contract by the bailee, that he will take such care of them, as that they may not be damaged by any gross neglect of his own. For in such cases it seems to be contrary to reason and justice, that where a man is to have no reward, he should be charged without some default in him. He is not therefore bound to do every thing he is capable of, but if he keeps the goods with an ordinary care, he performs his trust. And even if he keeps the goods bailed to him, as he keeps his own, it is evidence that he has discharged his undertaking : and therefore in such cases, if he keeps his own negligently, yet if he keeps the other in the same manner, he is not chargeable. As if the bailee be known, as an idle, drunken, careless fellow, and come home drunk and leave open all his doors, by which the goods are stolen, yet he shall not be charged, because it was the bailor's own folly, to trust such person.

2. a The second kind of bailment, is where useful goods are lent to a friend, to be used gratis, and be restored in specie. In this case the law implies, that the borrower contracts to use the strictest care and diligence to keep the goods, so as to restore them back again safe to the lender, because the bailee has a benefit by the use of them, and if he be guilty of the least neglect, he will be answerable. As if a man lend another his horse to go westward, or for a month, and he goes northward, or keeps the horse more than a month, he is liable for any accident that befalls him, on the northern journey, or after the expiration of a month ; for he has made use of the horse contrary to the trust, and it may be, if the horse had been used no otherwise, than he was lent, the accident would not have befallen him. But the bailee is never answerable for any accident that befalls things bailed to him, while he is using it according to the bailment, and is guilty of no neglect. Therefore if a horse bailed as aforesaid, should be stolen from the stable of the

z Lord Raymond, 913. a Ibid.

the bailee, where he was properly secured, he would not be liable : but if the stable doors be left open, he shall be answerable for the neglect. For he ought to take the utmost care, but in no case shall he be charged where there is no default in him.

3 *b* The third kind of bailment is where goods are delivered to the bailee, to be used by him for hire, and restored in specie. He is bound to take the utmost care and return the goods at the expiration of the time for which they were hired : but shall not be charged without being guilty of some neglect. Much of the intercourse among mankind is carried on in this way, and the hirer must pay such price as is stipulated, or what it is reasonably worth, if no express stipulation be made.

4 *c* The fourth kind of bailment, is where goods are delivered as a pawn, to be security for money borrowed. The creditor who takes the pawn is bound to restore it on payment of the debt, and if he uses due diligence, and reasonable care in keeping them, he will be indemnified against any loss ; and if they are lost without his neglect he may resort to the pawnbroker for his debt. If the pawnbroker be at charge in keeping the goods, as if it be a horse, and he provides hay for it, he may use it for his reasonable charge. But if the money be tendered, before the goods are lost, the pawnee shall be answerable for them, because by detaining them after tendry of the money, he is a wrong doer, and must in all events be answerable for the loss.

5 *d* The fifth kind of bailment is where goods are delivered to be carried, or some thing to be done with them, by the bailee for a reward, to be paid by the bailor. If they are delivered to a common carrier, and he is to have a reward, the law implies a contract to answer for the goods, at all events, excepting the acts of God, or the enemy of the state : for otherwise carriers who are trusted with things of great value, would be under a temptation to confederate with thieves. But if they are delivered to a private person, tho he has a reward, yet he is only to do the best he can, and while he is guilty of no neglect, he is responsible for no accident, or misfortune.

6. * The sixth sort of bailment, is the delivery of goods to a person, who is to carry them or do something about them gratis, and without receiving any reward for such work or carrying. This is an action by commission, and if the bailee behaves negligently he is answerable, but the contract must depend upon the nature of the engagement, whether it be general or special. A general undertaking only implies a contract against gross neglects; and therefore if one undertake to carry brandy for another, and mischief be done by some person meeting the cart, or if a drunken man come by in the street, and pierce the cask, the bailee is not liable and for this reason because he is to have nothing for his pains: but if the accident happen by his neglect he is answerable. But if a man undertake expressly to do such an act safely, and securely, if the thing come to any damage by his miscarriage, the law implies a contract, that he will be answerable; for this reason, that he undertakes the task, and is intrusted on these terms.

In all these instances a special qualified property is transferred by the bailor to the bailee, together with the possession. The bailor therefore is considered as having the general property; because he has a contract for its restitution, and the special property is in the bailee. Either can maintain an action for any injury done to such property, while in possession of the bailee. The bailor because he has the ultimate property, and the bailee because he is responsible to the bailor. But a recovery by one will bar the action of the other. The bailee has no power to transfer the property entrusted to him, without the consent of the bailor.

3. Of hiring and borrowing: and here I speak only of that kind of hiring, and borrowing, by which the property of the thing is transferred, and the hirer, or borrower is not bound to return the same thing hired, or borrowed, but another of the same nature. Where the identical thing must be restored, I have considered under the head of bailment. All the difference between hiring, and borrowing is, that in the first, restoration must be made of a similar thing, to that which is borrowed, with compensation for the use,

and

* 1d. Raym. 913.

and in the last, the restoration is without compensation : but in both instances the property is transferred from the person that lends or lets, to the borrower or hirer.

In all instances of hiring, where a specific restitution is to be made, the law leaves it to the party hiring, to stipulate for such reward, for the use of the thing as he pleases. It is left to the freedom of mankind to contract respecting the sum, to be paid for the use of a horse, oxen, and any article of husbandry, as much as it is, to fix upon a price to be given for horses, oxen, or the like. But when we take into consideration money, or any articles whatever, loaned by one person to another, to be repaid in money, or articles of like kind, by which a debt is contracted, the law has limited the premium to be allowed for the use. Therefore when I let or loan to a person money, wheat, or any article, or commodity whatever, to be repaid at a future time, I must confine myself within the limits of the law, respecting the compensation I am to receive. So in all instances where a man is indebted to me, and it is agreed to delay the payment, and he agrees to allow me a recompense for the delay, I cannot exceed the interest limited by law.

The loaning of money for interest, is now become so universal, and common a practice, that we can hardly suppose that there ever was a period when it was deemed repugnant to morality, or religion. Yet from a rule in the law of Moses inhibiting the Jews from lending on usury, or for interest to their own nation, tho it expressly permitted it to be done to a stranger, and from an opinion of Aristotle that money was barren, and that therefore interest for it was contrary to the nature of it, we find that the Roman canonists prohibited the taking of interest. But this is not the only instance in which the church of Rome, interdicted as sins, the most innocent transactions, while they indulged for a trifling reward, the most enormous crimes. The consequence of this impolitic restriction, was to throw the business of lending on interest, into the hands of the Jews, who did not pay a conscientious regard to the canon law : and the danger to which they were exposed, obliged them to resort to the

real practice of usury for their indemnification. So that the regulation which was intended to prevent usury, gave birth to those practices which are really detrimental to the community, and deterred mankind from loaning money at that moderate rate of interest, which is consistent with the public welfare. The taking of interest was allowed by the Roman law, which as far as it respects property, is founded on the clearest reason and justice.

The statute law of this state, has established the rate of interest in all cases at six per cent. for a year. In the computation of interest on a debt, interest upon interest is never allowed.—Where sundry payments have been made upon a debt carrying interest, the courts of law have established the following rule. Compute the interest to the time of the first payment, if that be one year or more, from the time the interest commenced, add it to the principal, and deduct the payment from the sum total. If there be after payments made, compute the interest on the balance due, to the next payment, and then deduct the payment as above, and in like manner, from one payment to another till all the payments are absorbed, provided the time between one payment and another, be one year or more: but if any payment be made before one year's interest has accrued, then compute the interest on the principal sum due on the obligation, for one year, add it to the principal, and compute the interest on the sum paid from the time it was paid up to the end of the year, add it to the sum paid, and deduct that sum from the principal and interest, added as above. If any payments be made of a less sum than the interest arisen at the time of such payment, no interest is to be computed, but only on the principal sum for any period.

This rule was adopted, and established in the year 1734. Previously to that time, the following mode of computation had been in practice in some parts of the state. To compute the interest from the time it commenced to the time proposed, and add it to the principal sum, compute the interest on each payment from the time they were made, till the time proposed, add each payment and interest together, and deduct from the debt. By this last mode, it is apparent that every payment applies directly upon the principal sum of the debt, and none to the interest, till after the principal

pal is discharged—and the consequence is, that if a man loan another a sum of money and receive and indorse the amount of the interest annually, if this mode of computing interest be adopted, the whole debt comprehending principal and interest, would be discharged in twenty five years. But by the mode now in force, this injustice is remedied by the application of payments in the first instance to the interest, and not to the principal, unless they surmount the interest : and as no interest is ever to be cast upon interest, it steers clear of compound interest, which the law will not permit. This mode would be unexceptionable, were it not, that in computing interest on obligations, on which many payments have been made, and on obligations on which no payments have been made, a very different and unequal measure of justice is meted out to the respective debtors. For where no payments have been made, simple interest only is computed : where many payments have been made, compound interest comparatively speaking, is computed, and the consequence is, that two debts of equal magnitude, let them be on interest for a number of years, let one make frequent payments and the other none, and compute the interest by this rule to a certain time, and we shall find, that the person who has made the payments, must eventually have a considerable larger sum to pay, taking in all his payments, during the period proposed, than he who has not made any payment. The debtor who makes the greatest efforts to be punctual, pays compound interest, and the most negligent debtor goes clear with simple interest.

The old mode of calculating interest is so manifestly unjust, that no person can wish to see it restored. The inequality of the present mode is so great, as to require to be remedied. Any mode which at a given rate per cent. shall operate equally in all cases, must be acknowledged to be just and right. Compound interest is the only possible mode that can be adopted, that will have this operation. By that rule, we shall find that no difference will eventually be made between them, who make frequent payments on their obligations and those who make none : and by the same rule, all payments will first be applied to the interest. No reasonable objection can be made against compound interest. At the end of a year,
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it is manifest that the interest is as much due to the creditor, as the principal. If payment be delayed, interest ought to be computed upon the one as much as upon the other. As this is the only fair, just, and equal mode of computing interest, I presume that the period is not distant, when mankind will cease to be frightened by words, and compound interest be established by law.

Our courts formerly adopted very narrow principles with respect to the allowance of interest on debts, rarely allowing it, unless there was an express contract to pay it. I have known them refuse to allow it on protested orders ; in actions for money had and received : and in actions of debt on judgment : but of late, more liberal and equitable principles have been adopted. They have allowed interest on actions for money had and received. *f* And in one case upon a note without interest, after the day of payment had elapsed. The just rules of allowing interest are very plain. It ought to be computed on all debts where there is an express or implied contract to pay it, and in all cases, where in justice and good conscience it ought to be paid, or where there has been an unreasonable delay of payment of the principal debt, it ought to be allowed by way of damages.

The principle by which the rate of interest on money loaned, is determined, depends on a calculation of the quantity in circulation, and the goodness of the security. If money be exceeding plenty, interest will be low in proportion. This has been exemplified in Europe since the discovery of America. The immense quantities of gold and silver imported into Europe, encreased the price of things, and lowered the rate of interest. If the security for the money be undoubted, and there be no hazard of loss, the interest ought to be proportionably low : such are the general principles that will govern mankind respecting the rate of interest ; but the legislature cannot make such nice discriminations, but must establish one general rule, extending to all cases of loans. However, where from the very nature and terms of the contract, the principal sum is put in hazard, it is not considered as governable by the general law, but the parties are admitted to make such contracts as they please, respecting the premium, where the premium and principal

f *Elderkin vs Dyer*, Supreme Court of Errors. 1795.

principal are both at risque. Such are the cases of bottomry, respondentia, and policies of insurance.

1. *g* Bottomry, is in the nature of a mortgage of a ship, where the owner hires money, and pledges the keel or bottom of the ship, for the repayment. If the ship returns, the premium agreed on must be paid, and the ship and borrower are both answerable; if it be lost, then the lender loses his money. But if the loan be not on the ship, but on the goods or merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower is bound to answer the contract, who is therefore said to take up the money at respondentia.

2. *b* Policies of insurance, are contracts made by persons in this manner. If a person has a vessel at sea, or that is about performing a voyage, it is usual for him to apply to some person, who is called an insurer, who for a certain premium, will insure against all losses. If the vessel return safe, then the insurer gains the premium. If it be lost, then he must pay the sum that was insured. The rule to calculate the premium is, to proportion it to the hazard and danger of the voyage. This practice is much favoured by law, as it tends to distribute the losses in trade among the commercial interest in general, and saves individuals from total ruin by a single loss.

4. *i* Debts are things in action, and may be defined to be the right which one person has to call upon another, for a certain sum of money; and the duty or obligation of the person to pay the sum. Debts may be considered as resulting from contracts express or implied: as when one person delivers to another property, or performs for him certain services, this creates an indebtedness from one to the other, and there is a contract express or implied, to pay what the property or service was reasonably worth. Debts are of two kinds, those which are evidenced by written contracts, and those which depend on parol proof.—Debts which are supported by written evidence, are of two kinds; those which are of record, and those which are subscribed by the party obligated.

i. A.

g 2 Black. Com. 457.

b Ibid. 458

i Ibid. 464.

1. A debt of record is a sum of money which appears to be due by the evidence of a court of record. Thus a sum found due from one person to another on an action, by the judgment of a court, is a debt of record, which is the highest evidence of a debt.

Recognizances acknowledged by parties in court, are debts of record. These are entered into for various purposes. In criminal prosecutions for bailable offences, the person may procure bail, who enter into recognizances in presence of the court. So persons may acknowledge bonds of recognizance for their good behaviour. These recognizances are all upon certain conditions, that the criminal appear, abide final judgment, or be of peaceable and good behaviour; and if the conditions are fulfilled, the recognizance is void, but on failure it becomes forfeited. In civil actions, bonds of recognizance may be required in certain cases, from one party to the other. In all cases where the plaintiff lives out of the state, where the suit is by attachment, or the plaintiff is so poor, that he is unable to pay a bill of cost, bonds for prosecution must be given. So where the body of the defendant is attached, he must give bail to abide final judgment, and in cases of appeal, bond must be given to prosecute such appeal. These bonds are all expressed to be on certain conditions, which if performed, they are discharged, if forfeited, the damages are recoverable by them.

* Debts evidenced by written contracts, are further divided into those which are signed and sealed, as bonds, and those which are unsealed, as promissory notes, and bills of exchange. They are further divided into debts by due specialty, and debts due by simple contract.

In England, debts by specialty, are where the security is under hand and seal, and debts by simple contract, are where the contracts are in writing unsealed or parol. But in this state, the courts have adjudged, that promissory notes tho unsealed, are specialties. Our law then is, that specialties consist of obligations under hand and seal, and of promissory notes: and the simple contract comprehends all other contracts, written and parol. The distinction however between specialties and simple contracts, is not of any great importance in this state, because there is no preference given

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to creditors in such cases, but they all stand on the same footing. I proceed to treat of bonds, promissory notes, and bills of exchange, which are the usual written contracts, that are used between individuals, in the ordinary negotiation of business.

1. A bond or obligation, is an instrument, or deed written on paper or parchment, by which the obligor, obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another, at a day appointed. If this be all, the bond is called a simple one : but the general practice is to add a condition, that if the obligor does some particular act, the obligation shall be void, or else to remain in full force : as payment of rent, indemnity on any account, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest ; which principal sum, is usually half the penal sum specified in the bond. In case the condition is not performed, the bond becomes forfeited, and at common law the obligor is liable to pay the whole penal sum ; but as this is usually much larger, than what the obligee ought in justice to take, our statute law has enabled courts of law to take up such matters in equity, and to render judgment for such sum as is due in justice and good conscience.

2. Promissory notes, contain express promises for value received, to pay by a certain time, a certain sum of money, or some collateral thing. Wherever there is a debt certain to be secured, it has become the usual practice to secure it by note, as the security is of a more simple, tho' of as high a nature as bonds : and bonds are now rarely used, unless it be in contracts where it is necessary to provide for the performance of certain conditions.

3. Bills of exchange, are a written security, calculated for the convenience of commercial transactions, and may be defined to be an order, direction, or request, from one person in favour of another, to a third person, desiring him to pay a certain sum on his account. The person who writes the request, is called the drawer, the person to whom it is directed, is called the drawee, and the person to whom it is made payable, is called the payee.

Bills of exchange, are foreign or inland : foreign bills are drawn

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by merchants residing abroad, upon their correspondents or connexions at home, or by merchants at home, upon their correspondents or connexions abroad. A bill of exchange, is deemed a thing in action, for the law implies a promise on the part of the drawer, that if the drawee refuses to accept and pay the bill, that he will pay it himself; and therefore it is the common practice, to express that a value has been received by the drawer. The drawer not being liable if the drawee pays, it is necessary for the payee to make application to the drawee, to present him the bill, and request him to accept and pay it. If the drawee refuses to accept, or accepts and neglects payment, for the term of three days, the payee must go before some notary public and procure it to be protested, for non-acceptance or non-payment, as the case may be, and within fourteen days give notice to the drawer. If there be no such notary public in the place, then the protest may be made by some substantial inhabitant, in the presence of two credible witnesses, and then the drawer is liable to pay the bill, with all the costs and damages. The payee must apply in due time to the drawee, and proceed and notify regularly, if he means to subject the drawer, and if he is guilty of any neglect or delay, by which the debt is lost, he shall sustain the loss.

Inland bills of exchange, are drawn by persons within the state on each other. They are here known by the name of orders, and are become a very common and convenient mode of negotiation. They are dependent on the same general principles, as foreign bills: but as they differ in some respects, I shall treat of them particularly. Orders are to be drawn in precisely the same form as bills of exchange, and it is usual to express a value received, which precludes any dispute respecting the consideration; but if a value received, be not expressed, it must be averred and proved in an action grounded on the order. The payee or bearer must in a reasonable and convenient time apply to the drawee, present the order and request him to accept, and pay the same. If the drawee refuse to accept, or if he accept and refuse to pay immediately, or if the payee be willing to wait a reasonable time, and he does not make payment, then the payee must give notice within a reasonable time to the drawer, of the non-acceptance, or non-payment

non-payment of the order, and then the drawer becomes liable to pay the same to the payee. For in all cases the law implies a contract, that the drawer will pay the order to the payee in case of the refusal or inability of the drawee. But to render the drawer, liable to pay the order on account of the inability of the drawee to pay, it behoves the payee to apply as soon as convenient and reasonable in the course of business, to the drawee, to present to him the order for acceptance and payment : for in case of a failure, and bankruptcy of the drawee, after the drawing of the order, the drawer is not liable to pay the order, unless the payee has used due diligence, in his attempt to obtain it of the drawee ; and on failure, has given reasonable notice to the drawer. Therefore if the payee neglects unreasonably to present the order, or delays giving notice of non-acceptance, or non-payment in a reasonable time to the drawer, so that it appears, if the order had been presented in due season to the drawee, that he would have paid it, or if reasonable notice had been given to the drawer, that he might have called upon the drawee for the debt, then the drawer shall not be liable to pay the order to the payee ; because the debt is lost by the neglect of the payee. A mere acceptance of the order by the drawee will not exonerate the drawer ; but if the payment be not made in a reasonable time, and due notice be given, the drawer is liable, but if the payee receives any part of the money on the order, or takes the security of the drawee for it, he wholly acquits and discharges the drawer. There is no need of a protest of the order by our law, to make the drawer liable. The refusal to accept, or neglect of payment, is sufficient to charge him, and no formal protest is ever made. As the law in discharging the drawer from any liability to pay the order to the payee, goes on the principle that there has been a failure of the drawee, and the drawer must lose his demand on the drawee which is owing to the neglect of the payee, it follows of course, that where there has been no failure of the drawee, if the payee delays presentment of the order, or notice of non-acceptance, he shall not be foreclosed of his demand upon the drawer ; because no inconvenience accrues from such delay to the drawer, for the same demand continues against the drawee, as well

as the same ability to pay. But whenever any prejudice can arise to the drawer by reason of the delay, he shall be exonerated from any liability, as if the demand be on the drawee by book, and the payee neglect presenting the order, or giving notice of the refusal till the drawer be barred by the statute of limitations, he cannot be liable. So that the drawer can never be liable where there has been a delay on the part of the payee, unless his demand, and the ability of the drawee be such, that the drawer may recover his debt.

In addition to these particular securities, there are many other written securities, which are things in action, and depend upon the general rules and principles of contracts. There are also an unbounded variety of verbal contracts express and implied; as well as book debts, which are governable by the general principles, which cannot be here considered, but will be taken up in the next book and treated of with all the minuteness that is necessary.

I shall now proceed to make some observations, which are equally applicable to all written contracts.

1. * All obligations or written contracts are good tho they want a date, or have a false or impossible date, for the date is not the substance of them. The day of the delivery of an obligation is the date, when there is no day set forth: but if it be dated one day, and was delivered another, it is considered as bearing date on the day of the delivery. / If the plaintiff declare on a bond, or any written contract, bearing date a certain day, and does not say when it was delivered, this is good; for every deed shall be presumed to be made, and delivered on the day it bears date, but when he has once declared on a day, he is afterwards estopped from saying that it was first delivered on a different, because this would be a departure. m The plaintiff may declare on a bond, or other written contract, bearing date a certain day, and aver that it was first delivered on the day, when it in fact was delivered. Where the obligee declares generally on a bond of a certain date, the obligor may plead that it was first delivered on a different day,

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4 2 Co. 3. 3 Bac. Abr. 694. / Cro. Eliz. 773. m Lev. 196.

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but he must traverse the delivery on the day of the date. * If the bond was delivered before the date, on issue of non est factum joined thereon, the jury are not estopped to find the truth, that it was delivered before the date, and it is good from the delivery.

There are no particular formalities required by law, respecting the delivery of written contracts; but where they pass from one to the other by mutual consent, and pursuant to their intentions, they will be obligatory.

2. * It is an established principle, that two or more persons may be bound jointly, in any written obligation, or they may bind themselves jointly and severally. In case of a joint obligation, the obligee must sue all the obligors, but when he has obtained execution, he may collect the money of which he pleases, and the rest shall be accountable for their proportion to the person who paid. Where one of the joint obligors, die, his executor or administrator is wholly discharged of the debt at law, and it survives against the survivors: but in equity, if the surviving obligor be unable to pay, and the deceased obligor left a sufficient estate, then such estate shall be answerable. Where there are several persons who are bound jointly and severally in any written contract, the obligee may at his election, sue them all jointly, or any one of them, or he may at the same time, bring forward separate actions on the bond or security against each of them, and pursue them to judgment and execution. *p* But where there are more than two obligors, he cannot join two in the suit, he must join all, or sue them all separately, unless it appear that the other persons are dead.

q If there are several obligors, it continues to survive as the obligors die, till it wholly operates against the last obligor living, and then on his death, his executors, and administrators are only liable at law, and the right does not accrue at law against the executors and administrators of the others, tho it does in equity.

r If there are several obligors bound jointly and severally, the obligee may sue them all jointly or severally, but if he sues them jointly, he cannot sue them severally, for the pendency of one suit will abate the other. He may then collect the money of which

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* 2 Co. 4—6. * 2 Rol. Abr. 148. 3 Bac. Abr. 697. *p* Sid. 238. Cro, Jac. 152. *q* Bundy vs. Williams, S. C. 1793. *r* 3 P. Will, 405.

he pleases, but he can never make but one collection of the money, which operates as a discharge of the whole debt, and all the executions. / In case of joint and several obligations, if one of the obligors die, action will lie against his executor or administrator, and they are not discharged at law, as in the case of joint contracts,

* There may be several obligees or promisees, but a person cannot be bound to pay to two severally, but such obligation is void, where a bond is to pay to two persons, or either of them, the several part is void, and the bond is joint. If an obligation be to three, to pay money to one of them, they must all join in the suit, for they are but as one obligee, and if he to whom the money is to be paid, dies, the other must sue, tho they have no interest in the sum contained in the condition.

" In some cases, one person has the power to bind another by contract, as in all cases where a special authority is given for that purpose; and in all companies and copartnership, for the carrying on of commerce, according to the custom of merchants and from the nature of the connexion, each one has an implied power to contract for, and bind the whole, in the ordinary course of business: and a note given for a company debt, by one joint-merchant in the name of himself and partner, or by the name and firm of the company, is good against all.

3. *w* It is a general rule of law, that things in action are not assignable: and as we have no statute on the subject, the consequence is, that written contracts cannot be assigned at law, so as to enable the assignee to bring an action in his own name, for the recovery of the debt. The assignee however acquires such a property in the paper that contains the contract, that he may keep it, may receive the money due upon it, and may destroy it, and is not accountable for it to the assignor. But tho bonds, notes, and other written contracts, cannot be assigned at law, and tho the obligee is ever considered as the legal proprietor of the security, yet in equity, obligations are assignable for a valuable consideration, and the assignee alone has a right to receive the money, and if the obligor after notice of the assignment, pay it over to the obligee, he is compellable in equity, to pay it over again to the assignee. The assignee

f 2 P. Will. 313. *t* 3 Bac. Abr. 696. *u* Kirb. 148. *w* 1 Bac. Abr. 157.

assignee however, must take all obligations, subject to the same equity, and under the same conditions, that it was in the hands of the obligee. The law respecting assignments will be fully considered in the next book of our enquires.

8. We are to consider how Contracts are to be disannulled, rescinded or altered.

* All contracts before they are executed may be rescinded, retracted from, or waved by the concurrence of all parties, and in some cases, one of the parties may rescind the contract, as in sales with liberty of refusal. But where the time in which a contract is stipulated to be performed, is past, there is a perfection given it, by an action on one side, that renders it indissoluble, and it cannot be annulled ; but it may be released or discharged, for there is a difference between the dissolution and release of a contract.

y A release may either be express or tacit. An express release is where there is a regular acquittance or discharge from the contract. A tacit release, is where the person who claims a benefit by the contract, cancels it, or destroys the instrument, by which it can be proved. A release, may be parol, as where the parties *z* made a contract for the sale of lands, and a deed was given, and a note for the payment, but before the deed was recorded, they concluded to rescind the bargain, the deed was given up, but the person not having the note with him, agreed to and did discharge the promissor : on an action on the note, this was adjudged a good discharge.

a It is a general rule of law founded in reason, that if the person who derives a benefit from the fulfilment of a contract, is the occasion why it is not carried into execution, such contract is thereby annulled, and the contracting party excused from any obligation to perform it. If a man covenant within a certain term, to build a house upon the land of another, and the owner of the land forcibly prevent him from entering on the land, or prohibit him from doing it, he is discharged from the covenant. So if a man be bound to appear on a certain day, and before the day, the obligee cast him into prison, the bond is void. In such cases, the party

* 1 Powell, 412. y Ibid. 416. z Curtice vs. Beardley S. C. 1792.
 a 8 Rep. 92. Co Lit. 206.

ty bound to a performance will be in the same condition as if the agreement had been fulfilled by him, for if he whom it concerns to have my part of the covenant fulfilled, is the occasion why it is not, it is the same thing to me as if it were fulfilled.

b A contract of a lower degree is discharged by accepting a contract of a higher degree for the same thing, as taking a bond for a book debt, but by the common law, contracts of equal degree, do not extinguish or determine each other. It is therefore said, that the acceptance of one bond for another, does not discharge the first bond, and that a new bond does not discharge a judgment, but a recovery on the first bond will bar an action on the second.

c Where the right and the obligation meet in the same person, the contract generally is thereby dissolved, for since a man cannot be his own creditor and debtor, it follows, that if a man becomes representative to his debtor, his action ceases, there being no object on whom it can attach. Therefore, if the creditor makes his debtor his executor, the debt as between them is extinguished. *d* So if a man owe a debt to a single woman, and marries her, the contract is dissolved by act of law, by the union of the right and the obligation in him. But here a distinction is made between contracts that are to be performed during marriage, or after the death of the husband; for if the action can accrue during marriage, it is released by the marriage; but if it cannot rise during the marriage, and is not to be performed till the death of him who made the promise, then it is binding. As if a man before marriage, promise his intended wife, to leave her worth a thousand pound, as this contract is not to be performed during the marriage, so that an action can accrue to the wife in that time, it is not released by the marriage.

e A man may be discharged from his contract by the act of God; for when a thing is prescribed to be done, or omitted, if by the act of God, it become impossible, the person obliged shall not receive any prejudice, for not executing what is stipulated, if every thing be performed without neglect, that the parties might

b 1 Powell, 423.
1 Rep. 98.

c Ibid. 438.

d Ibid. 441, 442.

e 10 Mod. 268.

perform : because it would be unreasonable that those things which are inevitable, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person, in whom there is no neglect. As if a lessee covenant to leave a wood in as good plight, as it was in at the time of the lease, and afterwards the trees are blown down by tempest, the covenant is discharged.

f And the law is the same when a thing which is due in specie, so that it cannot be discharged by an equivalent, is destroyed without any default in the debtor, or delay in returning it. If I hire a horse to ride, or use for a certain time, and within that time he dies of some disorder, I am excused from redelivering him, for the performance being impossible, by the death of the horse, the contract is discharged.

g But where an agreement cannot by reason of the act of God, be performed according to the words, the party shall nevertheless perform it, as near the intent of the agreement as he can.

b The parties to a contract or agreement, may discharge it by any collateral satisfaction, on which they shall agree. As a bond for a hundred pounds in money, may be discharged by any collateral satisfaction.

9th. We proceed to unfold, how contracts may be fulfilled. It may generally be remarked, that a contract is to be fulfilled, by the performance of the thing stipulated at the time agreed on. Under this head the law respecting tendries will be considered.

i A tender is an offer to pay a debt, or perform a duty. Wherever the right to tender is personal, the tender must be made by the party himself, or by some person authorised for that purpose. Where the right is not personal, a tender may be made by any person, who is privy to the party, who has the right of tendry ; as the heir or executor, in cases where the tender is not confined to the person only.

k A tender may be made to any person, who either as party or privy, has a right to the thing tendered. Of course, tender to an

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executor

f Palmer, 548. *g* 1 Powell, 448. Plowd. 284. *h* 7 Mod. 144. *i* 5 Bac. Abr. 1, 3, 7. Report 13. 1 Inst. 208. *k* 5 Bac. Abr. 10. Cro. Jac. 245.

executor, or administrator is good, because they are privy in representation. So a tender to the assignee of a thing in action, is valid.

l To make a tendry valid, it is necessary for the person making it, to declare on what account it is made. It is not sufficient for a person to say, that he is ready to pay the debt, or perform the duty, but he must make an actual offer to pay the one, and perform the other. Money must be tendered in such manner, that it may be in the power of the person to whom it is tendered, to receive it, otherwise the tendry will be void. If a man say he is ready to tender the money, but keeps it in a bag, under his arm, it is not a good tendry : but if he make an actual offer of the money in the bag, and can prove that the sum intended to be tendered was in the bag, it is sufficient ; for it is usual to carry money in a bag, and it is the duty of the person who receives it, to tell it, and see if it be good. In a contract to transfer stock by a certain time, it is said to be sufficient to offer to transfer it, without an actual transference, if the other party be not present to receive it.

m All contracts for the payment of money, may be discharged by Spanish milled dollars, weighing seventeen pennyweights and six grains, at the rate of six shillings each, and other silver coin in proportion thereto, according to its weight and fineness, and by gold coin of the fineness of half johannes, at the rate of five shillings and fourpence a pennyweight, and so in proportion according to its weight and fineness.

n If a greater sum of money be tendered than is due, it is good, for the greater contains the less : but the person to whom it is tendered, must take no more than is due, and if he does, he is responsible for it. *o* Where a tender is to be made of any sort of goods, unless they are to be delivered according to some sample, it should be made in a middling kind of goods of the sort. *p* If a contract be made to pay money, or any collateral article, at a certain place, a tender can only be made at such place ; but if no place be appointed, the general rule is, that the tendry must be made to the person, at the place where he is, if he be within the same dominion ; but the debtor is not bound to go into a foreign country, in search of

l 5. Bac. Abr. 4.
o 4. Bac. Abr. 6.

2 Lev. 209.

p 1 Inst. 210.

m Statutes, 169.

n Strang. 916.

of the creditor. If the creditor be within the United States, I presume the tender in these cases must be made to him in person. But if the goods to be delivered, are heavy, and difficult to transport, the debtor, if no place be appointed for their delivery, must apply to the creditor, and enquire of him at what place he will receive them, and then a tendry at such place is good.

¶ In respect of the time of tendring, it may be observed, that when the contract is to pay money, deliver goods, or perform any act, at a certain day, the tender must be on such day. So if money be to be paid, or goods delivered on or before a certain day, a tender cannot be made before the last day limited for the payment, or delivery.

¶ Where money is to be paid, or goods delivered at a certain place, on or before a certain day, the tender must be made at the uttermost convenient time on that day; for as the debtor has till that time to make the tender, it would be unreasonable to require the attendance of the creditor, before that time; but the tender ought to be made time enough before the setting of the sun, to examine and tell the money, or take account of the goods. / If both parties meet at the place at any other time, on the last day, besides the uttermost convenient time, or upon any other day within the time limited, for the payment, or delivery, and a tender be made, it is good.

¶ But where payment cannot be made at the uttermost convenient time of the day before the sun sets, by reason of some circumstance not in the power of the parties, then a tender at the uttermost convenient time, in which it can be made, is good. As in case of a contract to transfer stock, an offer at the uttermost convenient time, before the usual hour of shutting the books, is valid.

¶ If money is to be paid, or goods delivered, at a certain place, tho no time be fixed, yet notice to the party, that payment will be made at a certain day, a tender at the uttermost convenient time of that day is good. Where a person has a right to pay money at a certain place, when he pleases, he must give notice to the creditor of the day, he will pay the money, and then a tender at the uttermost convenient time of the day, is good. If no time of paying mo-

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¶ 5 Bac. Abr. 8. Plowd. 172. ¶ Ibid. 5 Rep. 114. / 3 Lev. 104.
 610. Eliz. 14. ¶ 5 Bac. Abr. 9. ¶ 1 Inst. 211.

ney, or delivering goods, at a certain place, be fixed, yet if the parties meet at any time at the place, a tender is good.

If no time be fixed for the payment of money, or if it be made payable on demand, the debt is instantly due, and the creditor need make no demand. If the contract be for the payment of some collateral article, and no time be fixed, or it be payable on demand, it is necessary that the creditor should make a special demand of the debtor, for the article to be delivered, before he is bound to deliver, and if he fail to do it in a reasonable time, then the contract is violated, and the creditor is not obliged to receive the collateral article, but may demand the money.

W Where the contract is to pay articles to a certain amount of a general description, as articles of shop work, it is necessary in a plea of tender, to point out, and of course in the tender to set out the particular articles whereby they can be known and distinguished from others: for if the tender be good it is a bar to an action on the contract, and the articles vest in the person to whom tendered, and they ought to be identified, that he may know what article belongs to him.

*** As to the effect and consequence of tenders, it may be laid down as generally the case, that where contracts are made for the delivery of goods, or the performance of some duty, a tender by one party and a refusal to accept by the other, discharges the contract. As for instance, if I promise to deliver, a person so many horses, on such a day, at a certain price, and I tender them accordingly, my promise is fulfilled, and the property of the horses vest in the person to whom they are tendered, and they are at his risk.

In cases of contracts for the payment of money, a tender and refusal discharge the debt, where the case is so circumstanced that there is no remedy left to enforce the payment: but the general rule is, that upon a contract for the payment of money, a tender at the time, and refusal, does not absolutely discharge the debt: but the debtor is bound to keep the money, and if the contract carries interest, that will stop. If the creditor bring an action on the contract, the tender may be pleaded in bar of the action. But tho the right of recovery on such contract, may be

suspended

W Nicholas vs. Whiting, S. C. 1792.

** 5 Bar. Abr. 11, 12, 13.*

suspended, by force of a tender, yet a subsequent demand of the money, and refusal to pay it, revives the original contract with the interest, and then an action will lie to recover it. A tender therefore never vests the property of the money tendered in the creditor, but the same remains in the person who tendered, and he is therefore bound to keep it, and whenever a demand is made, to pay it. If he be sued on such contract, after the tender, he must plead in bar of the action, not only the tender, but he must aver that he has been always ready to pay the money, that he still is ready to pay it, and must offer, and produce it in court, for the purpose of keeping his tendry good, and avoiding a recovery on the contract. But where a debt is wholly discharged by a tender and refusal, it is necessary to plead the tender only.

y It is a settled principle of law, that where a man would upon doing a previous act, have acquired a right to a debt or duty, this is as completely acquired, if he make a tendry of doing the previous act, and the other party refuse to suffer it to be done, as if it had been actually done. Thus if a man should agree with another, upon the payment of one hundred pounds to give him a lease of certain lands. If the money be tendered, and a refusal to accept it and give the lease, an action will as well lie upon this agreement, as if the money had been actually paid and received, and then the lease denied. And it is to be observed, that every consequence which would have followed from a tender and refusal, will follow from being ready to tender, in case the person whose duty it was to be present at the place, where the tender was intended to have been made, neglected to be present.

In all contracts for the delivery of goods, if payment or tendry be not made at the time, the contract is broken, and no subsequent tendry of the article promised can be made, but the creditor has a right to demand the money. The debtor cannot fulfil his contract but he may tender money to the amount of the value of the goods, by way of amends : which is a principle of law, introduced by our courts.

z Where the obligation is for a sum of money to be paid in a collateral

y Bac. Abr. 14. z Sessions vs. Ainsworth, S. C. 1790.

lateral article, the debtor may tender the money in discharge of it, and it will be good.

By the common law, in all contracts for money only, if the money be not tendered on the day limited for the payment, no subsequent tendry can be made : but the creditor, if he pleases may put the party to the expense of a suit, tho he offers to pay the money ; and to pay the same sum, which the creditor is entitled to recover by the judgment of a court of law. It must be very apparent to the eye of reason, that it is a great hardship and highly unjust, that when the parties know the sum, that is to be paid, that the debtor cannot compel the creditor to receive it ; but must be put to the expense of a suit. Our courts have never adopted this rigid principle of the common law ; but guided by the plain dictates of reason and justice, we have introduced the practice of permitting a tender to be made, notwithstanding the day of payment is elapsed, of the same sum of money which the creditor would be entitled to recover by action, and such tender has all the legal effect of a tendry at the day. This sum is the principal and the interest, and if a suit has been commenced, then the legal cost till the time of the tender. This is a principle of common law established by our courts, and is a great improvement upon the common law of England.

10. We consider how Contracts may be discharged.

We have already remarked, that contracts may be discharged by an express or tacit acquittance. In addition to this, it may be observed, that contracts may be discharged by paying the thing due, and an acceptance by the creditor. It is a doctrine of the common law, that no contract can be destroyed or discharged but by evidence of as high a nature, as the contract itself. Accord and satisfaction is no discharge of a covenant, and payment is no plea to a bond, because being deeds, no plea of an act of the obligor is admitted, and the release must be under hand and seal. But in this state we have never adopted this distinction, which is so repugnant to common sense. A parol release would not by our law be a bar, but a written release, tho unsealed, will discharge any contract

contract of ever so high a nature. Accord and satisfaction, and full payment, are effectual pleas, supported even by parol testimony, to bar actions brought on covenants, bonds and contracts, of every description. So that we may say with truth, that all contracts may be discharged by payment and satisfaction.

II. We shall close this long chapter, by considering how Contracts may be avoided.

A man may avoid his contracts, by a variety of ways already enumerated, but under this head we shall treat of duress, and usury.

To constitute a contract, it is essential that the person contracting, give his voluntary assent, and if he be compelled to make the contract by force and violence, the law calls it duress, and such contract is not binding. There are two kinds of duress; by imprisonment, and by threats.

a Duress of imprisonment, is where a person is illegally imprisoned, by confinement in a common goal, or by the restraint of his lawful liberty elsewhere: when a person under such restraint, enters into a bond or other security, to the person who unlawfully restrains him, for the purpose of gaining his lawful liberty, he may avoid such bond, or security for duress of imprisonment. But where a person is lawfully imprisoned and enters into a contract to obtain a discharge from imprisonment, this is not duress, and the contract is binding. *b* Duress by threats, is either for fear of loss of life, of limb, of mayhem, or imprisonment, and this must be a well grounded fear, which might operate upon a man of constancy and firmness. But a fear of battery, tho never so well grounded, is not duress, nor the fear of having one's house burned, or his goods taken away or destroyed: because in such cases, should the threat be performed, a man may have satisfaction, by his action to recover damages, but no compensation can be made for the loss of life or limb.

c Duress to avoid the contract, must be done to the party himself. If two enter into an obligation, for duress to one, the contract

a 2 Bac. Abr. 156. Co. Lit. 253. Leon. 239. *b* 2 Inst. 483. 2 Rol. Abr. 124. *c* Ibid. 687. 2 Bac. Abr. 157.

tract may be avoided by him, on whom the duress was practised, but is binding on the other. Duress by a stranger, by the procurement of the party, that is to have the benefit, is a good ground to avoid the contract, but duress by a stranger, without the privity of the obligee, is no cause to avoid. A son may avoid his contract for duress, to his father, and the father for duress to his son, and the husband for duress to his wife, but the servant cannot avoid his contract for duress to his master, nor the master for duress to his servant.

Usury is the taking of more than six per cent. for a year, upon the loan and forbearance of the payment of money, or any collateral article.

d It is enacted by statute, that no person or persons whatsoever, upon any contract made, shall take directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of six pounds for the forbearance of one hundred for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time : and that all bonds, contracts, mortgages and assurances whatsoever, made for the payment of any principal, or money lent, or covenanted to be lent upon, or for usury, whereupon and whereby, there shall be reserved or taken, above the rate of six pounds in the hundred, as aforesaid, shall be utterly void.

All contracts which expressly carry more than lawful interest, or which include as principal, a greater sum than was due, or loaned, for the purpose of securing unlawful interest, are within the statute. As for instance, suppose I borrow of a person, one hundred pounds, and give him a note for a hundred and ten pounds with lawful interest, intending by the ten pounds to secure the usury, the contract is void. So if I am indebted to a person, and he calls on me to renew my security, and I secure therein unlawful interest, that had previously arisen, the new contract is usurious. So it is, if I have paid unlawful interest from time to time, and that is not deducted at the time of giving the new secu-

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rity, it is void ; because it contains a greater sum than is due, which is owing to the usurious agreement. Where a usurious agreement is made, and various securities are executed for the purpose of carrying it into effect, all such securities are void, whether usurious or not, because the general usurious intent, contaminates, corrupts and destroys every thing that is part and parcel of the agreement. Thus if I borrow of a man a thousand pounds, and give him my note for the same, payable with lawful interest, and then give him another note, for an hundred pounds, for the loan, and forbearance of the other note, over, and above the lawful interest : or if another person give him a note for the same purpose, here all the securities are void. But if my friend become surety for me, in the usurious contract, and I give him a bond of indemnity, and he is called upon, and pays such usurious contract, I cannot thereby avoid my bond given for the indemnity of the surety.

e If a contract be made for lawful interest, and then a subsequent contract be made for a greater sum than legal interest upon the first, such subsequent contract is void, but it does not invalidate the first. f It is a general rule, that if the principal and interest, be in hazard upon a contingency, it is no usury, tho the interest do exceed the rate allowed by law. So if there be a hazard, that the lender may receive a less sum than his principal. g But if the casualty goes to the interest only and not to the principal, it is usury, because he is certain to have his principal again. But it must appear upon the face, or from the nature of such contract, that there is a hazard in respect of the principal and interest, which was contemplated by the parties at the time of making the contract, and which was the foundation of the agreement, for the extraordinary premium ; h for if it be only a colourable contingency, manifestly to elude the statute, or if it appear that the parties did not consider the casualty as the ground of allowance, for more than six per cent. interest, then such contract is within the statute. This principle may be illustrated by the case of Hamlin vs. Fitch. i This was an obligation given by the defendant and one Campbell for the payment of 16839 dollars in final settlement certificates, within six months from the date with lawful interest—and the verdict of the jury was, that at the time of

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giving

e Cro. Eliz. 20. f Cro. Jac. 228. i Will. 286. g Cro. Eliz. 642.
 j Co. 70. h Cowp. 770. i Kibb. 260.

giving the obligation, it was corruptly agreed between the plaintiff, said Campbell, and the defendant, to give the plaintiff one thousand dollars in lawful money, for said loan, for the term of six months, more than the lawful interest; and in pursuance of such agreement, said Campbell gave the plaintiff an obligation for that sum, which was part and parcel of the same contract. Upon this verdict, the court upon a motion in arrest, determined that the contract was not usurious, because the final settlement certificates were in a state of rapid depreciation, and there was a hazard that the plaintiff would receive a less sum in value, than the articles loaned, because he was bound at the end of six months, to receive the same kind of securities, let them be depreciated ever so much, or the value thereof in money, if he had recourse to an action to compel a payment.

* A writ of error was brought to the supreme court of errors, and the judgment reversed. As their reasons contain some important principles, respecting usury, I shall here insert them at large.

The point of a loan, and corrupt agreement, between the parties, and Campbell, was directly put in issue, by the most correct and approved forms of pleading, and by them found for the plaintiff in error, in the very terms of the issue joined. The arrest of judgment goes upon the the ground, that no corrupt agreement could exist in a case of this nature, where the thing loaned, was in a depreciating condition, and of a perishable nature, and when the depreciation was at the risque of the lender.

1. The jury were the proper judges, not only of the fact but of the law that was necessarily involved in the issue; not only that there was in fact reserved by the agreement for loan and forbearance, more than at the rate of six per cent. per annum, but also of the legal deduction, that it was reserved by corrupt agreement. If the circumstances of the thing loaned were such, that no corrupt agreement could arise out of the transaction, the jury should have found for the defendant in error, whatever sums were secured by the notes, but as they have found a corrupt agreement, it is too late for the court to say, that there is no such corrupt agreement, the point being determined by the proper judges.

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* *Fitch vs. Hamlin*, Supreme Court Errors, 1789.

2. The fact, that the thing loaned was in a depreciating condition, and of a perishable nature, does not appear from the pleadings, and the court could not determine the fact by enquiry in pais, or by any matter dehors, the record upon the motion in arrest. This fact therefore, which was the sole ground of arresting the judgment, the court assumed without proof.

3. Had there been evidence of the fact, it would not have justified the court in arresting judgment, or in giving judgment for the defendant in error on the demurrer, for there is no article whatever, that can be loaned but what may and frequently does change its relative value, not excepting gold and silver coin, and if it be lawful for the lender, to reserve more than six per cent. per annum, to secure him from a possible loss, arising from a depreciation in one thing, he may in all : but this would destroy the statute against usury, and render it of none effect.

4. Whether at the time of the contract, in the present case, the article loaned, would appreciate, or depreciate, was perfectly uncertain, and a contract which in its creation was usurious, could never be saved by any subsequent contingent loss, in the value of the principal loaned.

5. This contract, was not a bargain of hazard, as in the case of money lent on bottomry bonds, where the lender, by the act of lending, is exposed to the loss of his whole principal : for in this case, the securities loaned, were equally liable to loss by depreciation, in whosoever hands they were, and the lending did in no measure encrease the risque.

A very common practice has taken place as a cover to usurious contracts, to loan a person money, and then make him purchase articles at a price, above their value, sufficient to secure the unlawful interest, and put the whole debt into the same security. The difficulty of ascertaining the precise value of goods, and of proving the usurious intent, has hitherto rendered this mode an effectual safeguard for usury ; but there can be no doubt, if proof can be adduced, that under these circumstances, a higher price is given for goods, than their actual value, for the purpose of concealing the

the usurious intent of the contract, that such deceitful practices will be deemed an indirect mode of taking unlawful interest, and such securities may be declared void. ¹

m Where a note contains unlawful interest, and being put in suit, judgment is rendered upon it, on a hearing in damages, and a new note given for the judgment, the debtor cannot in an action on the new note, resort back, and take advantage of any unlawful interest included in the first note.

n Where an obligation is given for the price of goods on absolute sale, tho ever so dear, it cannot be deemed usury. So where public securities were sold to a person for a certain sum, for which a note was taken, and an agreement made, that the debtor might return the specific notes, within a certain term, or the note should be paid in specie only, here tho the public securities were of less value than the sum secured by the note at the time of the sale, yet as the contract was for a sale, optional however with the purchaser to return them or pay the note within a certain time, it could not be usury.

o The law makes void all obligations, for more than lawful interest, and the party may not resort to an original just debt which was secured by a usurious obligation, as the ground of another action, after such obligation has been declared void by a court of law: for the loss of such debt is a penalty on the usurer, and if he might recover it by a different form of action, the statute would be defeated.

p Where a person takes a note for a sum justly due, and at the same time, as parcel of the contract, the parties make a parol contract for the payment of a certain sum over and above the lawful interest for forbearance of the note, it has been determined that such note is void, tho no recovery could have been had on the parol contract.

The statute respecting usury, further enacts, *q* that in any action brought on any bond, bill, mortgage, or other instrument whatsoever, it shall be lawful for the defendant, to inform the court

¹ Doug. 708, Cro. Eliz. 104. *m* Vourse vs. Gibson, S. C. 1791. *n* ^{by} Wadsworth &c. vs. Champion, S. C. 1792. *o* Cowls vs. Hart, &c. S. C. 1792. *p* Atwood vs. Whittlesey, S. C. 1793. *q* Statutes 261.

by filing his bill with the clerk, on the second day of the court, that such contract is usurious and oppressive, and for no just or reasonable consideration, and such court may proceed in searching the truth of such complaint, as a court of chancery, by examining the parties on oath, or in any other way proper to a court of equity, and if the plaintiff refuse to be examined on oath, he shall become nonsuit, and if on trial, the court find the contract to be usurious, they may adjust the same in equity, and give judgment that the plaintiff recover no more than the just value of the goods sold, or than the principal sum which the defendant received of the plaintiff, without interest, or any advance thereupon.

In construction of this statute, it has been determined that the defendant cannot be examined upon oath—but he may call on the plaintiff to testify, and then adduce any other proper proof.—But the plaintiff may appeal to the conscience of the defendant, and call upon him to testify.

CHAPTER TWENTY-SIXTH.

OF TITLE BY GIFT, SUCCESSION, COPY-RIGHT, AND FORFEITURE.

I. **O**F title by gift. The transference of personal estate by gift, is gratuitous—which distinguishes it from contracts, for gifts are without and contracts upon consideration. Every person has an absolute power of disposing of his personal estate. Of course, a voluntary gratuitous conveyance, without consideration, is equally valid and effectual, as a conveyance on sufficient consideration, unless it be where strangers, or creditors are affected. It has therefore become a settled maxim, that tho a conveyance by gift, shall be conclusive upon the giver, yet it shall not operate to defeat bona fide creditors of their just debts: for if a man should make a gift of his estate, either real or personal, and should not have enough left to discharge his debts, the creditors may take the estate which he has given away, in payment of their demands. For it is a maxim of law, as well as a principle of morality, that a man must be just, before he is generous.

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A gift must be accompanied with the immediate delivery of possession, so that the transference may instantly take effect, and the gift become executed, by vesting the property of the thing given, in the donee. This may be verbally before witnesses, or in writing, there being no particular mode adopted by law, as the requisite of such a mode of conveyance ; it being sufficient to shew that the donor meant to transfer and deliver the property to the donee. When a person has thus executed a gift, it is not in his power to retract it : but a mere promise to give without delivering the possession, would not be binding ; for a man cannot be compelled to fulfil a promise made upon no consideration. A man however, will not be bound by a gift, where he was drawn in, circumvented, or imposed upon by false pretences, ebriety or surprise.

f A gift of estate, is sometimes made in the contemplation of death, and is called *donatio causa mortis*, and is a death-bed disposition of property. As where a person in his last sickness, apprehends his death to be near, delivers, or causes to be delivered to another, the possession of any personal goods, (under which has been included bonds, and bills, drawn on his banker,) to keep in case of his decease. This gift, if the donor dies is absolute, excepting against creditors, and is accompanied with this implied trust, that if the donor lives, it shall revert to himself, being only given in expectation of death.

2. Of title by succession. *t* This is only applicable to corporations, capable of acquiring property, and the succeeding members acquire a qualified property, in all the goods of the corporation. This title to property, cannot strictly be predicated of aggregate corporations. For the corporation in legal consideration, has perpetual existence, and is not varied by the change of members. It has a certain name by which it is known and distinguished, and by which it is capable of acquiring property. This property therefore, must be considered, as vested in the corporation, which is a mere ideal entity, existing only in contemplation of law. As a corporation has perpetual duration, there can be no acquisition of property by succession, for where a member is

admitted

f 2 Black. Com. 514. *t* 1 P. Wms 406. 441. *t* 2 Black. Com. 430.

admitted into the corporation, he becomes one of the constituent parts, and thus acquires a title to the goods of the corporation, and not by succession to any other person.

But in case of a sole corporation, and the treasurers of the state, counties or towns, may be considered as bearing some resemblance to them, there may be a succession. Therefore if a bond be given to the treasurer of the state, and his successors in that office, then on his demise, or removal from office, his successor may in his own name, bring a suit on such bond.

3. Of the title by copy right. " It has been adjudged by the courts in England, that an author by the common law, has not the sole exclusive right of printing and vending his works, but that, when once they have been printed and published, they become common property, and any person may reprint them. To encourage science and literature, by securing to authors, the benefit of their labors, it is enacted by statute, *That* the author of any book, pamphlet, map, or chart, being an inhabitant or resident in the United States, his heirs and assigns, shall have the sole liberty of printing, publishing, and vending the same, for the term of fourteen years, from the publication; and if the author be then living, he, and his heirs and assigns, shall have the same right for fourteen years more. If any person within such term, shall print or reprint such books, or shall import them from other places, where printed, and knowingly vend them, they shall forfeit to the proprietor double the value of the copies printed, imprinted, vended, or exposed to sale, to be recovered in an action brought before a proper court. The author, assignee, or proprietor, must first register his name, as author, assignee, or proprietor, with the title of the work, in the office of the secretary of this state, who is empowered and directed to enter the same of record.

If the author or proprietor, neglect to furnish the public with necessary editions, or demands an unreasonable price, the superior court may order him to sell at a reasonable price, and on failure, may licence any person making complaint, to reprint and sell at such price, as the court judge reasonable.

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a Donaldson vs. Becket, 1794.

20 Statutes, 113.

If any person procure and print any unpublished manuscript, without the consent of the author or proprietor, he shall pay all damages which the proprietor or author sustains. But as the Congress of the United States, have established regulations which extend to the whole empire it is not probable that authors will in future take any benefit of this statute, but will conform to the state of Congress.

4. Of title by forfeiture. In England, a man for almost all the crimes he commits, is subjected to a forfeiture of all his personal estate : but here, the only crimes for which a man forfeits his estate to the public treasury, are man-slaughter, and burning public magazines or vessels, or in time of war, voluntarily delivering them into the hands of the enemy. Man-slaughter works an absolute forfeiture of all the personal estate of the criminal ; and in the other crime, the forfeiture is dependent on the discretion of the court.

CHAPTER TWENTY-SEVENTH.

OF TITLE BY LEGACY, DESCENT, AND INSOLVENCY.

IN our preceeding enquiries, we have treated of the several modes of acquiring and transferring personal things, by persons who are in being. In this chapter, I propose to consider the law respecting the settlement of estates, upon the decease of the proprietor. This will be comprehended under three heads, where the proprietor directs the disposition of his estate by will, where he dies without will, and leaves his estate to be disposed of by the operation of law ; and where he dies insolvent, not leaving a sufficiency of estate to discharge his debts. In England, the settlement of estates, composes a part of the jurisdiction of the clergy. The bishop of every diocese, exercises this power within the diocese. But in this state, the jurisdiction of the clergy is confined to things spiritual, and they cannot in virtue of their ministerial functions, intermeddle with temporal affairs. Judges of probate are appointed in certain districts, who have the cognizance of the settlement of estates.

1. A legacy, is a testamentary disposition of personal estate ; it becomes therefore necessary to prepare the way for a consideration of that subject, by an explanation of the law respecting wills.

The origin of wills, seems to have been co-eval with the existence of mankind, and they unquestionably result from the constitution of nature. The policy of different nations, has laid them under various restrictions and regulations, for the purpose of preventing fraud and dispute. The forms and requisites established by the positive laws of this state, to render a will valid and effectual, will be fully considered in this chapter, under the following heads.

1. Who are capable of making a Will.
2. The requisites of a Will.
3. Of the signing, sealing, and attestation, of a Will.
4. Of the publication, and republication of a Will.
5. Of nuncupative Wills and Codicils.
6. Of the proof, and the nature of Wills.
7. Of the revocation and avoidance of Wills.

1. I shall consider who are capable of making a Will.

All persons who are capable of making devises, are capable of making wills, to dispose of their personal estate ; and an infant, when arrived to the age of seventeen years, may dispose of his personal estate by legacy.

* A married woman, cannot make a disposition of personal estate by will, without the consent and licence of her husband ; because all the personal estate is by the marriage vested in the husband ; but if the husband consent to the will, it shall be binding and valid : and the husband frequently covenants with the relations, or some friend of the wife, that he will consent to and allow her liberty to make a will. Such will however, is not good without the assent of the husband, tho he has contracted to grant her permission : but this will prevent him from taking administration on her estate, which shall be granted to the person by her appointed, and the husband is bound by his covenant to allow it.

If a married woman make a will, and the husband suffer it to be proved, and deliver the goods, it shall be binding upon him. The husband may at any time before the death of the wife, revoke the will, to which he has assented, but cannot afterwards, unless it be done before the will is proved. If a woman make her will, and afterwards marry, such subsequent marriage, is a revocation of the will. Traitors and felons, by the English law, are incapable of making wills, by reason of the forfeiture of their goods, but by our law, as there is no forfeiture of estate for crimes punishable with death, such criminals are not deprived of the power of making wills.

2. The requisites of a Will.

y The testator must be capable to make a will, and not be under any legal disabilities. There must be some person in being, who shall be capable of taking the thing given at the time, it ought to vest, or the gift will be void. The testator at the time of making the will, must have a mind or serious intent to make a will. This must be evidenced by a solemn deliberate act, and therefore any rash, unadvised, or jesting conversation, will be of no force. The mind of the testator must also be free, and uninfluenced by fear, fraud, or flattery, for if he be moved by fear, circumvented by fraud, or overcome by immoderate flattery, the will is void. So if a man in a state of inebriety, make a will, it is void.

3. Of the signing, sealing, and attestation of a Will.

It is not material on what a will is written, whether paper or parchment, or in what language or character, nor whether the expressions are proper and grammatical, provided the will be legible, and the intent of the testator be discoverable: but if it cannot be read, or the expressions are so obscure, ambiguous, and uncertain, that the intention of the testator cannot be collected from it, then it is void. Regularly, a will ought to be signed and sealed by the testator—but I apprehend, the want of a seal would not nullify it. By the common law, if a testator write his name at the beginning of a will, and seals it, or seals it only, it will be

be sufficient to render the will valid. Wills that contain devises of land, must be attested by three witnesses, but where personal estate only is disposed of, no witnesses are required.

4. Of the publication and republication of a Will.

z The publication of a will, is an essential part of it, tho the law has prescribed no particular mode. Any act or declaration, importing a solemn intent in the testator, to dispose of his estate, will be sufficient; but without some such act or declaration, the instrument will not be good as a will. The delivery of a will as a deed, has been adjudged to be a good publication. A publication may be inferred from such circumstances, as evidence the intent of the testator, and will have the same force to render the instrument valid, as if expressed by parol declaration. If the testator shew the will to witnesses, saying there is my last will and testament, or herein is contained my last will and testament, this is sufficient, without making the witnesses privy to the contents, provided the witnesses can attest to the identity of the writing. It is necessary that the whole will should be present at the time of attestation, for if a man make a will on several pieces of paper, and none of the witnesses ever saw the first, this is not a good will.

a A will if not actually obliterated and destroyed, may altho revoked, be revived by a subsequent republication: for being an ambulatory instrument, deriving its efficacy from the intent of the testator, it may be rescinded, suspended, enlarged or contracted, as to its operation at the pleasure of the testator. At common law, very slight words effect a republication, it being an act peculiar favoured. Therefore any act done by the testator subsequent to the revocation, by which he demonstrated an intent that the will should stand, amounted to a republication.

b A codicil, tho not annexed to a will, is a republication, if it clearly relates to the subject matter of the will, thereby plainly evincing, that the testator contemplated that, as his will at the time of making the codicil.

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z Powell Devi. 81, 86.

a Ibid. 652.

b Ibid. 653.

^c The effect of a new publication of a will is, that all which the words of the will embrace at the time when the new publication is made, shall pass thereby : and the terms and words of the will, shall be construed to speak with regard to the property the testator is possessed of, and the persons named therein at the date of the republication, just the same as if he had had such additional property, or such persons had been in being, at the time of making his will, the conclusions from that fact, being that the testator so intended. The next consideration therefore, upon a will so republished, is what the words of the will at the time of republication import, for they will operate to their full extent, at that time, just the same as if the testator had then made a new will.

5. Of nuncupative Wills and Codicils.

Wills are of two kinds, written, and unwritten, and the latter are called nuncupative. These are allowed only in cases where in extreme and dangerous sickness, the testator has neither time, nor opportunity to make a written will—and seriously and deliberately declares his intention respecting the disposition of his estate, before a number of witnesses, called for that purpose. But this will must immediately be reduced to writing and proved before the court of probate, as soon as practicable, for the law will not suffer such things to rest for any length of time, on the memory of witnesses, on account of the danger of fraud. A nuncupative will, must be made by a man in his last sickness, at home or among his friends, or family, unless by unavoidable accident, to prevent imposition by strangers.

^d A codicil is a little writing, being a supplement, or addition to a will, made by the testator, and annexed to it, for the purpose of explaining, altering, adding to or subtracting from some of the former dispositions of the estate by the will ; and this may be in writing, or without, and is then called nuncupative.

6. Of the proof, and the nature of Wills.

^e A written will, which contains only a disposition of personal estate, is valid, and sufficiently proved, if it be written in the testator's own hand, tho it has neither name nor seal to it, nor witnesses

^c Powell Devi. 674. ^d 2 Black. Com. 500. ^e Ibid. 501. 5 Bac. Abr. 514.

nesses present at the publication : but it must be written fair and plain, and there must be proof that it is his hand writing. If it be written in another man's hand and never signed by the testator, yet if it can be proved to be according to his instructions, and approved of by him it shall be good. But the better way is to have wills signed, and published in the presence of witnesses.—When a will is found among the choicest papers and evidences of the testator, or locked up in a safe place, the evidence is esteemed conclusive : but tho it be found in such places, yet if it be written in another's hand, or if the name or seal of the testator, or one of them be not annexed to it, then some further proof will be required. If a writing be found, under the testator's own hand, yet if it be but a scribbling writing, written copy-wise, with a great distance between the lines, in strange characters, with many interlineations, lying among his waste papers, this shall not be accounted his will—but a draft or direction for it : but if it can be proved that the testator declared, that this should be his will, it is sufficient proof of it, and it shall be effectual. If it be proved that the testator declared his will, was in the hands of a third person, who produces such a writing, and swears to the identity, this will be sufficient proof ; if he said it was written by his own hand, then it must be proved by comparison of hands. If a witness will testify, that the writing produced, to be the last will of the testator, is his will, or that he said it was, or that it should be, or that it is the same writing, that was shewed him, and to which he is a witness, this shall be sufficient proof, tho he never read or set his hand to it.

• In respect of the nature of wills, it may be observed, that a will differs from all other acts and deeds, which mankind do in this life : for tho it be made, sealed and published in ever so solemn a manner, yet it has no operation till the death of the testator. A man may therefore alter or revoke his will, when he pleases, and make as many new one's as he thinks proper. Every new will, is a revocation of all former one's, without any express words or declarations for that purpose : but codicils are not, because they are only additions, or supplements to them. A testament

ment is said to have three degrees: an inception, which is the making of it,—a progression which is the publication,—and a consummation which is the death of the testator. When a will is perfected by the death of the testator, it transfers estates as effectually as deeds.

7. Of the revocation and avoidance of Wills.

f A person may revoke his will at any time when he pleases, and such revocations are express or implied. Express revocations are some positive act of the testator, and may be in writing or parol. Revocations by writing are where the testator by a subsequent will or codicil, expressly revokes a preceding will. Revocations by parol, are where the testator seriously and deliberately declares, with an intention to revoke, that he revokes his will, or that it shall not stand, or any other words clearly evincive of such intention.

Implied revocations, are where the testator makes some declaration, or does some act which amounts in law to a revocation, because it furnishes the ground to presume that his mind is changed. If he declare, that a certain person who is his heir at law, shall inherit his estate, this will revoke a will giving it to a stranger. So a subsequent will or a codicil, different from the former, tho containing no express words of revocation, will revoke it. So if the estate be altered, sold, lost, or consumed.

A will may be avoided and set aside by the courts of probate, or by the superior court, on an appeal to them, when the testator had not a legal capacity to make it, and where any artful fraudulent plans or undue measures, were practised to circumvent him; as if advantage is taken of his age, infirmity and weakness, and it appears that the will was not altogether voluntary, and framed agreeably to his true intent and design, respecting the disposal of his estate. But where a man in the exercise of his rational faculties, and free from any restraint upon his mind, makes a testamentary disposition of his estate, it is not in the power of courts of law or equity to set them aside; tho he may have made a very improper disposition of it, and disregarding children and relations, has given it to utter strangers. For as he has an absolute power to dispose

dispose of his estate by will, the law regards not the person to whom it is given, but only considers whether he acted voluntarily and possessed the exercise of his reason at the time of the transaction.

In the next place, I proceed to the consideration of the office and duty of an executor. It is an essential ingredient in a will, that an executor be appointed to carry it into execution, and if none be appointed, it is to be considered as a codicil rather than a will: but if by any means an executor be wanting, the court of probate may supply the defect. For the illustration of this subject, I shall consider,

1. Who may be Executors, and of Administrators who act instead of Executors.
2. Of the power and duty of Executors.
3. Of Co-Executors, and when Executors are liable to pay the debts out of their own estate.
4. Of actions brought by, and against Executors.
5. Of Executors in their own wrong.

1. Who may be Executors, and of Administrators who act instead of Executors.

§ Every person who is capable of making a will may be appointed an executor, and so may married women and minors, who are capable at the age of seventeen years, of executing the trust. But where the testator appoints no executor, or the executor dies, or refuses to accept the trust, or to give bonds with surety, for the faithful administration of the estate, then the court of probate may commit administration of the estate, with the will annexed, to the widow or next of kin, and upon their refusal or incapacity, to one or more principal creditors, as they shall think fit, and in case the executor appointed by the testator, be under the age of seventeen years, then an administrator may be appointed during the minority of such executor; and in these cases, the administrator with the will annexed, is in the same situation with the executor, only one derives his authority from the appointment of the court of probate, and the other from the will, but their power and duty are the same.

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b If a person dies intestate, and administration is granted upon his estate, and the administrator dies, without having fully administered, then new administration must be granted by the court of probate, of the goods and estate not administered, : for the first administrator cannot continue the trust reposed in him, to his executor or administrator. But if an executor dies, not having fully administered, and appoints an executor, the trust devolves upon him : if he dies without an executor, then administration must be granted upon the estate, not administered, with the will annexed.

The court of probate, may cite the widow, next of kin and creditors, to take letters of administration in these cases, and on their refusal, may appoint others.

2. Of the power and duty of Executors.

i A person knowing that he is appointed executor of the will of any deceased person, must within thirty days after the decease of the testator, cause such will to be proved, and recorded in the register's office, in the district where the deceased last dwelt, or present said will, and declare his refusal to accept of the executorship, upon penalty of forfeiting, without sufficient excuse made and accepted by the judge of probate, five pounds per month, after thirty days, till he cause the same to be done.

k An executor must see that the deceased is buried in a manner suitable to his rank and dignity in life, and all reasonable expenses will be allowed. He must cause the will to be proved in the probate court, and there lodged and recorded. The probate of the will, in the district where the deceased last dwelt, is sufficient and will extend thro the state

l The executor must give bonds with surety, for the faithful management and settlement of the estate. He must collect all the estate of the deceased, and calling two or more disinterested judicious freeholders, neighbours and friends to the deceased, he must in their presence, and by their direction, they being under oath, cause to be made a true and perfect inventory, of all the estate of the deceased, both real and personal, and cause the same to be in-

b 2 Bac. Abr. 385. Swinb. 396. *i* Statutes, 52. *k* 2 Black. Com. 508. *l* Statutes, 52.

dented, one part of which, shall be kept by the executor, and the other part be lodged with the court of probate. If the executor neglects to make an inventory within two months after the decease of the testator, without sufficient excuse made to the acceptance of the judge of probate, he shall forfeit five pounds per month, till the same be done. An inventory purports not only an account of all the estate, but an appraisal at its just value.

m An executor in virtue of his office, gains a temporary qualified property, in all the personal estate of the deceased : but he has no power over the real estate, only to cause it to be inventoried and appraised, unless there be more debts that can be paid by the personal estate, in which case the court of probate may order a sale of sufficient real estate, to be made by the executor, to discharge the debts. But the real estate, is supposed on the death of the testator, to descend instantly to the devisees.

The executor has full power, to sue for and collect all debts due to the testator, and to recover all the goods and chattels which belonged to him ; for he is considered as the representative of the deceased, and is invested with the same power. Whatever debts are recovered, and whatever estate is of a saleable nature, and may be converted into money, are called assets in his hands ; which he may convert into ready money, and pay the debts and demands upon him, as executor.

n If any person or persons, in this state, shall have in their custody, any goods or chattels, belonging to the estate of any deceased person, or any bills, bonds or accounts, or such other things as may tend to disclose such estate, and on demand by the executor, or administrator, shall refuse to make delivery, or give a satisfactory account, it shall be in the power of the next assistant or justice of the peace, to issue a warrant to apprehend and bring such persons before them, and bind them with sufficient sureties, to appear before the next court of probate, who are empowered to examine them on oath, respecting such things ; and on their refusing to answer every interrogatory, to commit them to goal, till they conform.

The executor must pay the funeral charges of the deceased, and the expence of settling the estate, and also all his just debts. To ascertain the debts, and bring estates to a speedy settlement, it is enacted by statute, ^o that the courts of probate be impowered to direct executors and administrators, to give public notice to the creditors, to bring in their claims within such time, as the court shall limit, not exceeding eighteen months, nor less than six, by posting up the same in the town where the deceased last dwelt, and by advertising in one or more of the public newspapers in the state, and any further notice that the court shall judge necessary: and if any creditor, shall neglect to bring in his claim within that time, he shall be forever debarred of any recovery, excepting creditors living out of the state, who may exhibit their claims within two years, after publication of notice: and shall be entitled to receive payment out of the clear estate that remains after the payment of the debts exhibited in the limited time.

When the debts are ascertained, it becomes the duty of the executor to pay them, and for that purpose, he may dispose of the personal estate of the testator; ^p and if that be insufficient, then in cases, both of testate and intestate estates, it is in the power of the court of probate, to order the sale of so much of the real estate, as shall raise sufficient money to pay the same, with incident charges of sale, in such manner as shall appear to be most beneficial to the estate. An executor in the settling and paying of debts, must consider them all, as standing on the same basis: and whether they are secured by judgment, specialty or simple contract, there is no preference. By the common law, if a man makes his debtor his executor, this shall be a release of the debt, in preference to legacies, provided there be sufficient assets to pay the debts.

When the debts are all paid, then it becomes the duty of the executor, to deliver over the estate, agreeable to the directions of the will. Where the legacy is in some specific article, then the delivery of that article, will discharge the executor: if it be for the payment of a certain sum of money, the payment of that sum, discharges

discharges the legacy : but if the legacy be not specific, and contains a certain portion of goods, then a legal distribution must be made by distributors, appointed for that purpose by the court of probate.

3. Of Co-Executors, and when Executors are liable to pay debts out of their own estates.

P A testator may appoint different persons to execute different parts of his will ; but a sole executor, cannot accept to execute a part and not the whole. If a man appoint several joint executors, they are esteemed as one person, representing the testator, and therefore, the acts done by any one of them, which relate to either the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all ; for they have a joint and entire authority over the whole.

q It seems to be a settled principle, that one executor, shall not be charged with the wrong or waste of his companion, and shall be liable no further than for the assets that came to his hands. One executor cannot regularly sue another, for any thing that relates to the will, or that is within the power, duty and office of an executor. It is enacted by statute, that executors, who are also residuary legatees, when all or any part of their legacies are withholden from them, by their co-executors, may bring their action of account against their co-executors, for the recovery thereof : and the like action is allowed to the residuary legatees, against executors. As joint executors, in representing the testator, make but one person, they must all join in suing, and all be joined when sued, but of this, no advantage can be taken only in abatement.

The executor is liable to pay debts out of his own estate when the creditor has recovered judgment against him, in the capacity of executor, and taken out execution against the estate of the deceased in his hands, and the executor neglects or refuses to deliver such estate upon the execution, and the same is returned non est inventus. Then the creditor may bring a scire facias against the

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executor

P 2 Bac. Abr. 395.

q Godolph. 134. Cro. Eliz. 318.

executor, and have judgment affirmed against his person and estate.

r A devastavit, is defined to be a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets, contrary to the trust and confidence reposed by them, and for which, by the common law, executors and administrators are answerable out of their own property, as far as they had or might have assets of the deceased. Executors may be guilty of a devastavit, not only by a direct abuse, as by spending or consuming the effects of the deceased, but also by such acts of negligence and wrong administration, as disappoint creditors of their debts. Therefore selling things under their value, or neglecting to sell them at a proper time, will amount to a devastavit. f So an executor who releases a debt, shall be charged to the value of it, let him receive ever so small a sum. r If he pays money in discharge of a usurious bond, entered into by the testator, it is a devastavit, if he be knowing to the fact. u By the common law, if he take a bond in his own name, for debt due by simple contract, he shall be chargeable as much as if he had received the money. But in this state, I presume that the taking a note for a book debt, or a new note for an old debt, would not charge the executor, if he be guilty of no neglect. w So if an executor submits the debt, or whatever he is entitled to, in right of the testator, to arbitration, and the arbitrators award him less than his due, this being his own voluntary act, shall bind him, and he shall answer for the full value.

By our law, an executor or administrator, can never plead that he has no assets, or that he has fully administered. For in all cases, where the estate of the deceased is insufficient to pay his debts, the estate must be represented insolvent, and then settled in the manner prescribed by law. No action therefore is ever brought by a creditor against an executor or administrator, on the ground of a devastavit; for if the estate be solvent the devastavit of the executor, is no injury to the creditor: and if it be insolvent, then an action is brought on the bond, given by the executors to the court of probate, for the benefit of the creditors; in which

r 2 Bac. Abr. 431. f Hob. 86. i Ibid. 167. u 2 Lev. 189.
w 3 Leon. 41.

action full damages may be recovered, not only for a devastavit, but for any default or neglect in the administration of the estate. In like manner, where the estate is solvent, and the administrator or executor guilty of a devastavit, action will lie on the bond to recover the damages sustained by the heirs and legatees.

4. Of actions brought by and against Executors.

* An executor stands in the place of the testator as his representative, he may therefore maintain an action in his right, upon all contracts, on which action would lie in favour of the testator: and is liable to actions on all contracts made by the testator, on which he was liable himself. But by the common law, an executor cannot bring an action of trespass, for a tort done to the person, or goods or chattels of the testator, in his life time. y But it has been adjudged, that an administrator may bring trover for goods converted in the life time of the intestate.

Executors or administrators after the will is proved, may bring trover for the goods of the deceased, converted by a stranger, before the will is proved. For altho an executor has no property in the goods of the testator till he has proved the will, yet as soon as this is done, he does by relation acquire a general property therein, from the time of the death of the testator: and in such cases, he need not name himself as executor, because his action is grounded on the qualified property, acquired as executor, which is sufficient to maintain his action.

z When an action of debt is brought against an executor, it must be in the detinet only; for he is not personally liable, but only in respect of the testator's estate, he therefore cannot be said to owe. The deceased in his life time may be said to have owed the debt, and the executor detains it. In England, the personal estate only, is assets in the hand of the executor, for the payment of debts, and the real estate descends to the heirs. In case the personal estate proves not sufficient to pay the debts, actions will lie against the heirs on all contracts where they were bound.—
a But in this state, the real estate as well as the personal is charged with the payment of debts, if necessary, and is assets in the hands

of

* 2 Bac. Abr. 443. y Kirby vs. Clark, S. C. 1792.

z 1 Roll.

Abr. 603. a Phelps vs. Miles, &c. S. C. 1790.

of the executor or administrator, and may by them be disposed of for the payment of debts. The statute law has provided modes, by which all the estate of the deceased if necessary, may be applied in payment of his debts, before it can vest in his heirs. It is therefore necessary that provision should be made for an action against them, for a debt due from the deceased.

b Action of assumpsit was brought against an administrator, stating a debt against the intestate, that real estate had been sold to pay debts, and the defendant had the money in his hands, laying a promise of the administrator, to pay in his personal capacity. On the plea of non-assumpsit, the court were of opinion, that the administrator, receiving a sufficiency of the estate of the intestate, did not subject himself to an action, to pay out of his own estate in the first instance.

c The law respecting the actions that can be maintained against executors and administrators, is settled by lord Mansfield, in the case of Hambly against Trott, with a perspicuity and elegance, that distinguish all adjudications of that great man and respectable judge.

The maxim, that personal actions die with the person, is denied to be generally true; and he makes a distinction between actions, which survive against an executor, or die with the person, on account of the cause of action, and actions that survive against an executor, or die with the person on account of the form of action.

1. Where the cause of action, is money due, or a contract to be performed, gain, or acquisition of the testator by the work and labour, or the property of another, or a promise by the testator express or implied,—where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises from a crime, supposed to be by force, and against the peace, the action dies: as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many others cases of like kind.

2. As to those actions which survive or die, in respect of the form of action. In some actions, the defendant could have waged his law, and therefore no action lies in that form against an executor

b *Aplin vs. Roberts*, S. C, 1790.

c *Cowp.* 371.

utor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action, where in form, the declaration must be with force and arms, and against the peace, or where the plea must be, that the testator was not guilty, can lie against the executor.— Upon the face of the record, in such case, the cause of action arises from a tort or crime, and all private, criminal injuries, as well as all public wrongs, are buried with the offender.

But in most, if not all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose.

An action on the custom, against a common carrier, is for a tort and supposed crime. The plea is not guilty, and therefore it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another and bring him back again, an action of trespass will not lie against his executor, tho it would against him—but an action for the use and hire of the horse, will lie against the executor.

An action was brought against an executor, alledging the delivery of a cow, to the testator, to keep for the use of the plaintiff, and that the testator sold the cow, and converted the money to his own use. Here the executor cannot be chargeable in trespass, or trover, for the wrongful act of converting the money; but an action will lie against him for the money had and received, by the testator.

There seems to be this fundamental distinction. If it is a sort of injury, by which the offender, acquires no gain to himself, at the expense of the sufferer, as beating, or imprisoning a man, there the person injured has only a reparation for the crime in damages, to be assessed by a jury. But where besides the crime, property is acquired, which benefits the testator, there an action for the value of the property, shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator, in cutting down another man's trees, but for the benefit arising to his testator, for the value or sale of the trees, he shall.

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So far as the tort itself goes, an executor shall not be liable, and therefore it is, that all public and private crimes die with the offender, and the executor is not chargeable : but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged.

5. Of Executors in their own wrong, or de son tort.

An executor in his own wrong, is a person who without any authority from the deceased, or the court of probate, does such acts as belong to the office of an executor or administrator. There are a variety of acts which will make a man an executor in his own wrong, such as possessing, and converting the goods of the deceased to his own use, paying his debts out of his assets, suing for, and receiving his debts, and generally all acts of acquiring, possessing, and transferring the estate of the deceased, will make a man an executor in his own wrong, because these are the only indicia, by which creditors can know against whom to bring their actions : and therefore in suits against executors in their own wrong, they are named as executors generally. A person may be an executor in his own wrong, by releasing debts due to the deceased, by paying legacies with his effects, by entering on a specific legacy without the executor's assent, by paying and discharging the mortgages of the deceased with his money and goods : by delivering to the wife of the deceased, more apparel than is suitable for her, or by answering as an executor to any action brought against him, or by pleading any other plea, than that he never was executor.

A man may take care of the funeral of the deceased, feed his cattle, take an inventory of his estate and effects, discharge his debts and legacies with his own money, repair the houses in decay, and provide necessaries for his children, without being an executor in his own wrong, for these are acts of kindness and charity.

There cannot regularly be a rightful executor, and an executor in his own wrong, for when there is a rightful executor or administrator, a stranger who acquires possession of the goods of the deceased, is a trespasser, and may be sued as such : but this must be understood where he takes possession of the goods, as a trespasser, for
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if there be a rightful executor, and a stranger takes the goods of the testator or intestate, and claiming to be an executor, pays debts, and legacies, receives debts, enters upon a term for years in name of the deceased, or otherwise intermeddles, he is an executor in his own wrong. If a stranger get possession of the estate, before the probate of the will, he is an executor in his own wrong, because the lawful executor can only be chargeable with the goods that come to his hand. But he may bring an action against the wrongful executor, who cannot plead payment of debts to the value, or that he has given the goods in satisfaction of debts : because no man may obtrude himself upon the office of another, but on the general issue, such payment may be allowed in mitigation of damages.

The value of the thing taken by a stranger, so as to make him an executor in his own wrong, is immaterial, where he pleads that he never was executor, and they have been subjected to pay a debt of sixty pounds, for taking a bedsted, and a hundred pounds for taking a bible. By the common law, an executor in his own wrong, may pay just debts, and he is liable to the amount of the estate that comes to his hands, and may plead that he has fully administered. But as our law admits of no such plea, and as a person when he is once an executor in his own wrong, can not exculpate himself by taking letters of administration, but may still be sued as an executor in his own wrong, it follows in the case of an insolvent estate, that a man for intermeddling might be subject to the payment of all the debts, let him receive ever so small a sum, because he cannot represent the estate insolvent.

Having considered the nature of Wills, and the office of Executor, I shall in the next place treat of legacies, which are the substantial part of wills, and the payment of which constitute a principal branch of the duty of executors.

A legacy is defined to be a bequest, or gift of goods, and chattels by testament, and the person to whom the gift is made, is called the legatee. Properly speaking, devise relates to a gift of lands by will, and legacy, to a gift of personal estate, tho they are

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both

f 2 Black. Com. 512. 3 Dec. Abr. 466.

both sometimes used indiscriminately. Any words that can be used which signify an intention to make a gift of some chattel to some person, who is so described that he can be known, will constitute a legacy; and any person in being is capable of taking a legacy. The general principles already stated respecting devises, will apply to legacies, excepting that general words in a will, will dispose of all the personal estate, the testator owns at his decease, tho acquired after making the will.

§ An ademption of a legacy is revocation of it, and a translation is the giving the thing to some other. *b* Where the testator makes a legacy to a person of the same, or a greater sum than he is indebted to him, if it appear that such legacy was intended to go in satisfaction of such debt, then such person is not entitled both to the legacy and debt. But if the legacy be less than the debt, or payable in a different article, or if it does not appear that such was the intent of the testator, then the legatee ought to recover both, for it cannot necessarily be presumed, that the testator intended that the legacy should discharge the debt.

Legacies on condition must be governed by the same general rules of construction, as conditional contracts, excepting where they are in restraint of marriage, and there the rule is that all conditions for the restraint of marriage generally, are void, because they are prejudicial to society: but that a condition which restrains marriage as to time, place, or person, is good.

Legacies are general, and pecuniary, as where a certain portion of goods, or money are given. Specific, as where some particular article of estate is given, as a piece of plate, a horse, or the like. Where there is a deficiency of assets to pay the debts, all the general legacies must abate in proportion to make good the defect: but no reduction shall be made from specific legacies, if there is estate enough beside: but when the debts have swallowed up all the general legacies, then the specific legacies may be taken to pay them. If the legacies are paid, and debts are discovered beyond the amount of the remaining estate, then the legatees are liable to refund their proportion to pay such debts. But as the time in which debts can be exhibited, is limited by law, the executor

§ Swinb. 522. *b* 3 Bac. Abr. 472, 473. *i* Ibid. 482.

executor may ascertain the fact before he pays the legacies, which will save any trouble of refunding. Legacies are said to be lapsed, contingent, or vested. A lapsed legacy is where the legatee dies before the testator, by which the legacy is lost, and sinks into the residuum of the estate. For a will is of no force, till the death of the testator. Of course a legacy, cannot vest till that time, if the legatee dies before the testator, the legacy cannot vest in him, but if he survives him ever so short a time, it will vest, and then descend to his heirs.

A contingent legacy is where the bequest depends upon the happening of some future thing, as a bequest to a person *if* or when he arrives to the age of twenty-one: if he dies before that time, the contingency on which the legacy was dependent, never happens, and of course the legacy is lost and is called a lapsed legacy.

A vested legacy is opposed to a contingent one, as if a bequest is made to a person to be paid *when* he arrives to the age of twenty-one. This is a vested legacy, the interest commences instantly on the death of the testator, tho the payment is to be made at some future time, and if the legatee survives the testator, tho he dies before he arrives to the age of twenty-one, yet his heirs are entitled to receive it at the time it would have been payable, had he lived. But it is said by the common law, if such legacy be made chargeable on the lands, it shall under such circumstances lapse for the benefit of the heir.

In case of a vested legacy, which is immediately due, and the payment of which is charged upon lands, or some property that gives immediate profit, then interest shall be paid from the death of the testator: but if it be chargeable on personal estate, then after the executor has had a reasonable time to pay it. And by the common law, the interest commences in a year after the testator's decease.

It is the duty of the executor to pay the legacies, unless some other person is ordered to do it by the will. By the common law of England, it is said, that the assent of the executor is necessary to perfect a legacy. But by our law, no such assent is necessary,

fary, and as soon as a legacy becomes due, action of assumpsit will lie in favour of the legatee against the executor, for the recovery of it.

When all the debts and particular legacies are paid, then the surplus or remainder, goes to the residuary legatee, if there be any appointed by the will, but if there be none, then it is considered as intestate estate, and will be divided among the heirs of the testator, in the same manner as if no will had been made, and of this we are next to treat.

2. I proceed to consider the title to personal estate by descent, which comprehends the settlement of intestate estates.

By the English law, the title by descent is confined to real, and never applied to personal estate, because that goes into the hands of the administrator, and from him to the heirs by a legal distribution, different from the descent of real estates. But as in this state, personal estate is transmitted by descent from the ancestor to the heir, in the same manner in case he dies intestate, as real estate, there can be no impropriety, in the application of this term to personal estate, as it expresses the idea with more clearness and certainty, than any other term.

A person is said to die intestate, when he leaves no will, and in that case, as he has not signified his intention, respecting the disposition of his estate, the law to preserve the public peace, points out the mode of settling the estate, and the persons to whom it shall descend.

* When a person dies intestate, the court of probate shall grant administration of his estate to his widow, or the next of kin, or both, and on their refusal or incapacity, to some other person, as the court shall judge fit : and on granting administration, sufficient bond with surety, shall be taken for a faithful discharge of the trust. When an administrator is appointed, his power and duty are the same with that of an executor, and he is bound to proceed to the settlement of the estate in the same manner. He must collect and inventory the estate, call in and pay out the debts. The only material

* Statutes, 53.

material difference between these offices, seems to be this, that if an executor dies, his own executor succeeds to his office, and is the executor of the first testator : but the executor of an administrator, or the administrator of an executor, is not the representative of the first testator ; for the power of an executor is founded on the appointment of the testator, which evidences a confidence reposed in him. Such executor may therefore transmit his power to his executor. But the administrator being appointed by the court of probate, no such confidence can be presumed between him and the intestate. Therefore, whenever an administrator dies, before he has completely settled the estate, or an executor in the same circumstances, leaving no executor, it is necessary for the court of probate, to grant new letters of administration, on the goods not administered upon, by the former executor, or administrator : but where an executor dies, leaving an executor appointed by his will, he may by virtue of such appointment, proceed to complete the settlement of such unsettled estate.

When the administrator has collected and disposed of the personal estate of the intestate, if there be not a sufficiency to pay the debts, the court of probate may order a sale of lands, sufficient to pay the debts and incident charges of sale. When the debts are paid, the administrator must settle his account with the court of probate, and of the residuum of the personal estate, if any, a distribution must be made to the heirs of the intestate, unless such heirs being legally capable of acting, shall make a division among themselves, and present the same, in writing under their hands, and seals to the court, and acknowledge the same before such court or an assistant, or justice of the peace, which voluntary division, shall be recorded in the records of the court of probate, and be conclusive on the parties : but if no voluntary division be made, then the court of probate may appoint three sufficient freeholders, who, under oath, or either two of them, may make a distribution of the estate.

1 The personal estate of a man dying intestate, is to be distributed among his lineal heirs, precisely in the same manner, as real estate, and among his collateral heirs, in the same manner as real estate,
not

not received by descent, gift, or devise, from some parent, ancestor or kindred. But the statute makes this difference in respect of the right of the widow, to a portion of the real and personal estate of the intestate. She is entitled to one third of his real estate during life, and to one third of his personal estate forever, if he leaves any children; but if he leaves none, then she is entitled to one half of his personal estate forever.

The statute law makes provision, that if any of the children, in the lifetime of the intestate, have any estate advanced to them by way of settlement, this shall be taken into consideration in the distribution, and all the children shall be made equal in their shares. If any have received their full shares, they are entitled to no more, and if any have received only part of their shares, they shall be made equal with the rest.

3. Of title by insolvency. When the estate is insolvent, the statute law has made the following provision to settle it.

" That when the estate of any person deceased shall be insolvent, or insufficient to pay all the just debts, which the deceased owed, the same shall be sold, and the avails thereof be divided and distributed to and among all the creditors, in proportion to the sums to them respectively owing, so far as the estate will extend, saving that the debts due to this state, and for sickness, and necessary funeral charges of the deceased, are to be first paid.

And the executor or administrator, appointed to administer on any such insolvent estate, before payment be made to any person, (except as before excepted) shall represent the condition and circumstances thereof unto the judge of the probate of wills and granting of administrations, who shall nominate and appoint two or more fit and indifferent persons, to make a true and equal appraisement of such estate, and administer the oath by law prescribed to them for that purpose; and shall also nominate and appoint two or more fit persons to be commissioners, with full power to receive and examine all the claims of the several creditors, and how they are made out and evidenced; which commissioners shall be sworn according to law, and cause the times and places of their meetings for attending the creditors, in order for
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the receiving and examining of their claims, to be made known and published, by setting up or posting notifications thereof in some public places in the town where such deceased person last dwelt; and also by advertising the same in one or more of the public news-papers in this state, and any further notice that the court of probate may order: And the said judge of probate shall allow six, ten or eighteen months, (as the circumstances of the estate may require) for the creditors to bring in their claims and prove their debts: At the end of which time limited as aforesaid, such commissioners shall make their report, and present a list of all claims to such judge, who shall order them a meet recompence out of the estate, for their care and labour in that affair.

And if on the report of the commissioners, such estate shall appear to be insolvent, the judge of probate to whom such report is made, shall order and set out to the widow of the deceased, (if any be) such necessary household goods as are mentioned in the law, entitled, "*An act for directing and regulating the levying and serving Executions,*" to be exempted from execution; which goods so set out, shall be her own property. And the judge shall order the widow's dower to be set out according to law. And the residue and remainder of said estate, both real and personal, (including that set out for the widow's dower, and under the incumbrance of her holding it for life) the judge of probate shall order and direct the executor or administrator, or executors or administrators, appointed to administer on such estate, to sell in such way and manner as to the judge shall appear safest and most for the benefit of the creditors. And such executors and administrators being so ordered and directed, shall have full power and authority, and they are hereby authorised and impowered to make sale thereof, and to make and execute legal and proper conveyances to the purchasers, which shall be good evidence in law for their holding the same accordingly. And such sales being made, the said executors and administrators shall render account to the judge of probate of the amount thereof, and the monies arising thereby. And the judge shall thereon order full payment to be made of the debts due to this state, and for sickness, necessary funeral expences and

and incident charges of settling and selling the estate. And the residue to be paid to the several creditors who have made out and evidenced their claims according to the directions of this act, as aforesaid, in proportion to the sums to them respectively owing.

Provided always, That notwithstanding the report of any such commissioners or allowances thereof made by the court of probate, it shall and may be lawful to, and for the executors and administrators aforesaid, to contest the proof of any debt at the common law.

And no process in law (except for debts due to this state, and for sickness and funeral charges) shall be admitted or allowed against the executors or administrators of any insolvent estate, so long as the same shall be depending as aforesaid.

And in case judgment shall be rendered against any executors and administrators of any insolvent estate, execution thereon shall be stayed until such estate can be settled according to this act: And the judgment creditor shall take no more than his proportion of the said insolvent estate with the other creditors; and in case that be not paid on the settlement of the estate, such creditor shewing the same, and producing a certificate of his proportion, the court shall order execution on such judgment for no more than the proportion aforesaid.

And whatsoever creditor shall not make out his or her claims with such commissioners, before the full expiration of the time set and limited for that purpose, as aforesaid, such creditor shall forever after be debarred of his or her debt; unless he or she can shew or find some other or further estate of the deceased, not before discovered and put into the inventory.

The executor or administrator, at any time in the course of the administration of the estate, when he discovers it to be insufficient to pay the debts, may represent it to be insolvent.

It has been adjudged, that a creditor to any amount cannot be a commissioner, that while the commissioners are acting within their power, and duty, no appeal can lie from the decree of the court of probate accepting of their report: and that their jurisdiction is final as it respects the creditors. It has also been adjudged

adjudged, that where commissioners exceeded their jurisdiction, as where they took into consideration matters arising after the decease of the intestate, that an appeal would lie : where the commissioners charged the claimant with the rents of land of the intestate, arising after his death, against a debt due antecedent to his death ; and where they allowed the administrator his expenses for supporting the children of the deceased, after his death. " It has been adjudged, that an appeal will lie in favour of heirs and legatees from the decree of a court of probate, accepting the report of commissioners allowing a debt to the administrator ; because there is no person to contest such debt at law, as there is in the case of creditors, for the administrator, who alone can contest debts, will not contest his own debt.

o Where there are mutual debts between the deceased, who died insolvent, and a creditor, they must be offset : and this may be done by the commissioners. The executor or administrator cannot retain a note and collect the whole, so as to subject the creditor by book, to take his average, and in case they refuse to make the offset, they may be compelled by a court of chancery : p and on the question of allowing to apply on the note, a sum found due by commissioners, the administrator or executor, may contest the allowance of the debt. If they should put such debt in suit, the court before whom action is brought, may apply the sum allowed by the commissioners, in payment of the debt. q If they collect such debt, a court of chancery will decree the payment of the sum which ought to have been offset.

r Action on note was brought against an executor, who pleaded the insolvency of the estate, to which the plaintiff replied the discovery of estate not inventoried, but on demurrer, the court held that a general action in such case is not maintainable ; but a special action adapted to the nature of the case.

s The executor or administrator are not responsible for the rents and profits of the real estate of the deceased, before it was represented insolvent, because it goes by law to the heirs or devisees ; but they are accountable after the representation of insolvency.

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CHAP.

n Staniford, &c. vs. Hyde, S. C. 1791. Fairwether vs. Curtice, S. C. 1793.
 o Hofmer vs. Brattle, S. C. 1791. p Hofmer vs. Merriam, S. C. 1792.
 q Rose vs. Clark, & Wife, S. C. 1790. r Jones's Ex'r. vs. Levenworth, S. C. 1789. s Storer vs. Hinkley, S. C. 1790.

OF INCORPOREAL PROPERTY.

CHAPTER TWENTY-EIGHTH.

OF INCORPOREAL PROPERTY.

INCORPOREAL property has already been defined to be an ideal right, issuing out of substantial corporeal things, either real or personal. In England there are several things which are classed under this description : but in this state, there is no right which can strictly be called incorporeal, but the right of ways : which is a privilege that one has to pass through the land of another. This right may be created in two ways, by prescription, and by grant. Grants may be express or implied. An express grant is where the proprietor of land by deed, conveys to another the right of passing over his land : or it may be grounded on a special permission, or licence, as where the owner of lands, grants to another the liberty to pass over them to go to mill or to market, or the like. In this case the right is confined to the grantee alone, and cannot be assigned. " Grants are also implied by operation of law. If a man conveys to me a piece of land, which I cannot approach without passing through his other lands,—as a piece in the middle of his field, he at the same time, impliedly gives me a way to it, and I may cross his other land for that purpose : for it is a general maxim, that when the law giveth to one any thing, it giveth impliedly whatever is necessary to enjoy the same.

A right of way by prescription, is where the inhabitants of a town or village, or the owners or occupiers of a certain farm, have immemorially used to cross such a ground, for a particular purpose. This immemorial usage supposes an original grant, which creates a right of way. Such is the common law : but this country has been so lately settled, that the right of prescription, has hardly had time to operate.

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APPENDIX.

A P P E N D I X.

CONTAINING FORMS AND PRECEDENTS.

DEED.

K NOW Ye, that To all People to whom these Presents shall come Greeting,
For the consideration of received to my full
satisfaction, of Do give, grant, bargain, sell and confirm unto the
said To have and to hold the above granted and bargained Premises, with the Appurtenances thereof, unto the said Heirs and Assigns forever, to and their own proper Use and Behoof. And also, the said Do for sel Heirs, Executors and Administrators, covenant with the said Heirs and Assigns, that at and until the enfealing of these Presents, well seized of the Premises as a good indefeasible Estate in Fee Simple; and have good Right to bargain and sell the same in Manner and Form as is above written; and that the same is free of all Incumbrances whatsoever. And furthermore the said do by these Presents bind sel Heirs, forever to Warrant and defend the above granted and bargained Premises to the said Heirs and Assigns, against all Claims and Demands whatsoever. In witness whereof have hereunto set Hand and Seal the Day of *Anno Domini 179*
Signed, sealed and delivered,
in Presence of

WRIT of SUMMONS.

To the Sheriff of the county of H—his deputy, or to either of the Constables of the town of G—in said county Greeting. By authority of the State of Connecticut, you are hereby commanded to summon A. B. of said G—to appear before the Court of Common Pleas to be holden at H—on the Tuesday of then and there to answer unto C. D. of W—in a plea of which is to the damage of the Plaintiff the sum of lawful money, and to recover the same with cost, the Plaintiff brings this suit. Fail not, and make lawful service and return. Dated at Justice of Peace.

WRIT of ATTACHMENT.

To the Sheriff of the county of H—his deputy, or to either of the constables of the town of G—in said county Greeting. By authority of the State of Connecticut, you are hereby commanded to attach the goods, or estate of A. B. in said G—to the value of lawful money, and for want thereof attach his body, and him have to appear before the Court of to be holden at on the day of then and there to answer unto C. D. of said G—in a plea of which is to the damage of the Plaintiff lawful money and to recover the same with cost, the Plaintiff brings this suit. Bonds for prosecution are given. Fail not, and make lawful service and return. Dated at

DECLARATIONS.

ASSAULT and BATTERY.

In a plea of trespass, whereupon the plaintiff declares and says, that on or about the day of at the defendant with force and arms, did an assault make upon the body of the plaintiff, and did him beat and strike many blows whereby he was much wounded, and greatly injured, to his damage

I. formation

Information **QUI TAM** for an **ASSAULT** and **BATTERY**; and **Warrant**.

To A. B. Esquire, Justice of the Peace for the county of H—comes C. D. of E—and complains and informs as well in the name of the State of Connecticut as in his own name, that F. G. of on the day of at with force and arms did an assault make upon the body of the complainant, and did him beat, and strike many blows:—which doings of the said F. G. are against the peace, and contrary to the statute in such case provided, and to the damage of the complainant lawful money. Dated at C. D.

To the Sheriff &c. By authority of the State of Connecticut, you are hereby commanded forthwith to arrest the body of the above named F. G. of and him bring before me the subscriber a justice of the peace for said county of at then and there to answer to the matters contained in the foregoing complaint of C. D. and be therein dealt with according to law. Bonds for prosecution are given. Fail not &c.

SLANDER.

In a plea of the case, whereupon the plaintiff declares and says, that from his youth to the present time, he has ever sustained a good character, and has never been guilty of the crime of theft, yet the defendant minding and intending to injure and destroy the character of the plaintiff, did on at maliciously, falsely, and openly, utter and publish in the hearing of sundry citizens of this state, the following false, and scandalous words of and concerning the plaintiff, (viz.) A. B. (meaning the plaintiff) is a thief and has stolen my horse (meaning the defendant's horse) and the plaintiff says that by reason of the defendant's speaking said words, he has been greatly injured in his good name and reputation, has been put to great trouble and expense and exposed to a criminal prosecution for the crime of theft, which is to his damage.

FALSE IMPRISONMENT.

In an action of trespass, whereupon the plaintiff declares and says, that the defendant on at did with force and arms an assault make upon the body of the plaintiff, and him did beat and wound, and unlawfully imprison, and detained and confined him in prison for the space of twenty four hours, and then and there did to him many other injuries, against the peace and to his damage.

MALICIOUS PROSECUTION.

In a plea of the case, whereupon the plaintiff declares and says, that he has from his youth to the present time, sustained a good character, and has never been guilty of perjury, of which the defendant was not ignorant, but contriving and maliciously intending to injure the character of the plaintiff, and bring him to public scandal and disgrace, did falsely and maliciously and without any reasonable, or probable cause whatever, on the day of cause and procure the plaintiff to be informed against, and indicted for the crime of perjury, in the following manner (*recite the information or indictment with the whole proceedings and the acquittal.*) And the plaintiff says that he was innocent of said crime of perjury charged in said information, yet the defendant well knowing the innocence of the plaintiff, but intending to injure him did falsely, and maliciously, and without any reasonable or probable cause whatever, cause, and procure the plaintiff to be informed against, indicted and prosecuted for the crime of perjury as aforesaid, whereby the plaintiff has been greatly injured in his reputation, and has been put to great trouble and cost in his necessary defence. To his damage.

TRESPASS for DEBAUCHING the PLAINTIFF'S DAUGHTER.

In an action of trespass, whereupon the plaintiff declares and says, that the defendant on the day of and at divers other times since, did, with force and

and arms break and enter into the house of the plaintiff, and assaults make upon the body of A. B. the plaintiff's servant and daughter, under the age of twenty-one years; and the defendant did then and there seduce and debauch the said A. B. and carnally know her, and get her with child. By which the plaintiff lost the company and service of his said servant and child for a long time, viz. from and was put to great labour and trouble, and was forced to expend one hundred pound in maintaining and taking care of her lying in of said child, to his damage.

CASE for DEBAUCHING the PLAINTIFF'S DAUGHTER.

In a plea of trespass on the case, whereupon the plaintiff declares and says, that the defendant on the day of at contrary to the mind and will of the plaintiff did enter his house, and then and there seduced, debauched and carnally knew A. B. his daughter, who lived with the plaintiff and depended on him for her support: and the defendant begot the said A. B. with child; by which the plaintiff lost the comfort and service of his servant and child for a long time, viz. from and was put to great labor and trouble and expended one hundred pounds lawful money in maintaining and taking care of her, in her lying in of said child, and during her sickness, to his damage

DISSEISIN.

In a plea that to the plaintiff the defendant render the seisin and peaceable possession of a certain tract or parcel of land, lying in and butted, bounded and described as follows containing about acres of which tract or parcel of land, the plaintiff on or about the day of was well seized and possessed in his own right in fee, and so continued thereof possessed, until on or about the day of when the defendant without law or right, and contrary to the mind and will of the plaintiff thereinto entered, and ejected the plaintiff therefrom, and ever since has, and still doth continue to deforce and hold the plaintiff out of the premises, taking the whole profits to himself, which is to the damage of the plaintiff the sum of wherefor the plaintiff brings this suit, and demands of the defendant, the surrendry and quiet possession of the premises, together with said damages and cost of suit.

PARTITION.

In a plea that the defendant do appart, divide, and set out to the plaintiff one moiety, or half part of a certain tract of land, containing acres, with the buildings thereon, lying in and butted, bounded, and described as follows—Whereupon the plaintiff declares, and says, that he, and the defendant hold said tract of land together, and undivided, as tenants in common, in such manner and proportion, that it belongs to the plaintiff to have, and to hold in severalty one half part of the premises, and that he has a right to have his said proportion, and part set out by proper metes, and bounds, and to hold the same in severalty, but the defendant always has, and still does refuse to have the same set out, and apparted to the plaintiff, or to suffer the plaintiff to hold the same in severalty, tho often requested, and demanded—which is a damage to the plaintiff, the sum of for which, and for costs, and to obtain partition of said described premises, the plaintiff brings this suit.

TRESPASS.

In an action of trespass, whereupon the plaintiff declares, and says, that on the day of he was, and ever since has been, lawfully seized and possessed of a certain tract of land, lying in butted, and bounded, and described as follows and the plaintiff says that on the day of the defendant did with force, and arms break, and enter into, and upon said described tract of land of the plaintiff, and did tread down, consume and destroy the herbage then and there growing, and did cut down one hundred trees, then, and there standing, and growing, to the damage of the plaintiff.

Where

Where the damage is done by cattle, the declaration must charge the defendant with breaking into, and entering upon the land of the plaintiff, and treading down, and destroying the grass, and herbage with his cattle, viz. horses, oxen, sheep, &c.

TRESPASS with respect to THINGS PERSONAL.

In an action of trespass, whereupon the plaintiff declares, and says, that on the day of he was the lawful owner of a certain bay horse, six years old, of the price and value of thirty pounds lawful money, and the defendant on said day, did with force, and arms, take and carry away said horse out of the possession of the plaintiff, to some place unknown, whereby the plaintiff has wholly lost the same, to his damage.

In an action of trespass, whereupon the plaintiff declares, and says, that the defendant, on the day of at did with force, and arms break into the dwelling house of the plaintiff, and did him assault, and beat, and unlawfully imprison for the space of twenty four hours, and did with force take, and carry away his goods, and chattels, viz: one thousand hats of the price, and value of one thousand dollars, &c. whereby the plaintiff lost the same, to his damage.

TROVER.

In a plea of the case, whereupon the plaintiff declares, and says, that on the day of he was possessed of ten yards of broad-cloth, of the value of ten pounds lawful money, which was his own proper estate, and being so thereof possessed, he afterwards on the day of lost said broad-cloth, out of his hands, and possession, which afterwards on the day of came into the hands and possession of the defendant, by finding: and the plaintiff says, that the defendant well knew that the said cloth belonged to the plaintiff, but contriving, and intending to deceive, and defraud him, he the defendant has at all times neglected and refused to deliver said cloth to the plaintiff, tho often requested, particularly on the day of and the defendant afterwards on the day of converted, and disposed of the same, to his own use, to the damage of the plaintiff.

DEBT.

In a plea that to the plaintiff, the defendant render the sum of lawful money which he justly owes, and unjustly detains, whereupon the plaintiff declares and says, that the defendant in and by a certain writing, or bond obligatory, under his hand, and seal, by him well executed dated the day of acknowledged himself holden, and firmly bound, and obliged unto the plaintiff, in the sum of to be paid in a reasonable time, when thereunto requested, as by said writing, or bond obligatory ready in court to be shewn appears: which debt the defendant has never paid, tho often requested and demanded, and tho reasonable time has accrued—to the damage of the plaintiff.

COVENANT.

In a plea of covenant broken, whereupon the plaintiff declares, and says, that on the day of for the consideration of he purchased of the defendant a certain tract of land, lying described as follows: and that the defendant on the day aforesaid, made, executed, and delivered to the plaintiff a deed of conveyance of said lands. in which among other things, the defendant covenanted with the plaintiff, that at, and until the enfeoffing of said deed, he the defendant was well seized of the premises, as a good indefeasible estate in fee—as by said deed ready in court to be shewn, appears. Now the plaintiff says, that at the time of executing said deed, the defendant was not well seized of the premises, as an estate in fee, and that

that he was not the owner of said land, but the same belonged to C. D. and thereupon the plaintiff says that the defendant his said covenant not regarding has wholly failed to keep, and perform the same, tho often requested, but has broken the same, and refused, and still does refuse to keep the same, to the damage of the plaintiff.

ACCOUNT.

In a plea that to the plaintiff, the defendant render his reasonable account, during the time in which he was the plaintiff's bailiff and receiver, whereupon the plaintiff declares and says, that from the day of till the day of the defendant was the bailiff and receiver of the plaintiff, and did during that time, receive of the plaintiff divers goods and merchandize, viz. to sell and dispose of, to merchandize with, and make profit thereof, and to render his reasonable account thereof to the plaintiff when he should afterwards be thereto requested: yet the plaintiff says, that the defendant has hitherto refused and still does refuse to render his reasonable account thereof, tho often requested, which is to the damage of the plaintiff the sum of and to recover the same, and that the defendant render his reasonable account, during the time he was bailiff and receiver as aforesaid, the plaintiff brings this suit.

ASSUMPSIT.

In a plea of the case, whereupon the plaintiff declares and says that on the day of the defendant was justly indebted to the plaintiff, in the sum of one hundred pounds lawful money, for money he the defendant before that time had received, to the use of the plaintiff, and being so indebted, the defendant in consideration thereof, afterwards on the day of assumed upon himself, and well and faithfully promised the plaintiff, to pay to him said sum of one hundred pounds lawful money, in a reasonable time then afterwards, when thereto requested; nevertheless the plaintiff says, that the defendant his said promise not regarding, hath never performed the same tho often requested, and tho a reasonable time hath long since accrued, to the damage

Whereupon the plaintiff declares and says that on the day of the defendant was justly indebted to the plaintiff in the sum of one hundred pounds lawful money for money before that time laid out and expended for the defendant, at his special instance and request— or lent and advanced for him at his special instance and request— or for goods sold and delivered, (*as the case may be*) and being so indebted, &c.

In a plea of the case, whereupon the plaintiff declares and says that on the day of the plaintiff and defendant came to a settlement and adjustments of accounts before that time subsisting between them, and there was found due from the defendant, on the account so stated, to the plaintiff, a balance of ten pounds lawful money, and the defendant being in arrear to the plaintiff said sum of ten pounds lawful money, he did on the day aforesaid, in consideration thereof assume, &c.

In a plea of the case whereupon the plaintiff declares and says, that on the day of he was the lawful proprietor of a certain tract of land, lying containing acres and is described as follows and the plaintiff says that on the day of at the special instance and request of the defendant, he permitted the defendant to enter into possession of the premises, and the defendant held, and occupied the premises for the space of one year afterwards, taking the whole profits to himself, and the defendant in consideration thereof, afterwards, on the day of assumed on himself, and well and faithfully promised the plaintiff to pay to him so much money as he therefor reasonably deserved to have, in a reasonable time when thereto requested, and the plaintiff says that he therefor, reasonably deserved to have one hundred pounds lawful money, of which the defendant had notice, yet the plaintiff says that the defendant his said promise not regarding hath never performed the same &c.

BOOK DEBT.

In a plea that to the plaintiff the defendant render the sum of lawful money, which to the plaintiff the defendant justly owes by book, to balance book accounts as by the plaintiff's book ready in court to be produced appears, which debt the defendant hath never paid tho often requested, &c.

SCIRE FACIAS.

To the sheriff, &c. Whereas, A. B. of brought his action of debt, to the court of common pleas, holden at against C. D. of an absent and absconding debtor, by writ, bearing date day of demanding ten pounds lawful money, which writ was duly served on said C. D. and also a true and attested copy thereof, with the officer's doings thereon, was left with E. F. of attorney and debtor to said C. D. more than fourteen days before the sitting of said court, to which said writ, being duly served, was returned, and by legal removes, said action came to the court of common pleas, holden at on the day of when and where, the plaintiff recovered judgment against the said C. D. for the sum of and cost of suit and thereupon took out execution, for the sums aforesaid, with one shilling more for said execution in due form of law, which execution was dated, and signed by clerk of said court, and directed to the sheriff of the county of to serve and return, which execution was put into the hands of sheriff of said county, who on the day of made return thereof with his indorsement thereon, that he had made diligent search and enquiry after the person and estate of C. D. and could find neither, and that on the day of he made demand of E. F. attorney and debtor to said C. D. of the sums contained in said execution, and that he refused to pay the same, or shew any estate of the said C. D. whereupon said execution could be levied. Fees As by the files and records of said court and said execution with the indorsement thereon may appear. And now the plaintiff says that said E. F. at the time the copy of said writ was left with him, was justly indebted to said C. D. in a greater sum than the amount of said judgment and execution, with the officers fees thereon: yet the defendant would not expose or discover any estate whereon said execution might be levied, nor pay the same or any part thereof, whereby the defendant has become liable in law to pay the same, out of his own estate, as his own proper debt: and the plaintiff says, that said judgment has never been reversed, nor has the same and the officers fees ever been paid, but are now due.

These are therefore by the authority of the State of Connecticut, to require you to make the said E. F. to know, that he appear before the court of common pleas, to be holden at on then and there to shew reasons if any he have, why judgment should not be had and rendered in favour of the plaintiff against the said E. F. for the amount of said judgment and execution, and officers fees, and the costs of this suit, as his own proper debt, to be paid out of his estate, and that execution should be issued against him accordingly. Fail not &c.

ACTION on STATUTE.

In an action brought on a certain statute law of this state, entitled an act for detecting and punishing trespasses in divers cases, and directing proceedings therein: whereupon the plaintiff declares and says, that by said statute it is enacted (*recite the first paragraph*) Now the plaintiff says, that on the day of he was well seized and possessed of a certain tract or piece of land lying in and described as follows, and that the defendant on the day of did with force and arms, break into and enter upon said tract of land, and did then and there cut down ten trees of a greater dimension than one foot diameter, and the same carry away to some place unknown, and the plaintiff says that the defendant by force of said statute, has forfeited and become liable to pay to the plaintiff ten shillings lawful money for each of said trees, and three times the value of said trees, and the plaintiff says that said trees were well worth three pounds lawful money, and that the defend-

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ant has forfeited and become liable to pay to the plaintiff the sum of fourteen pounds lawful money, being ten shillings for each tree, and three times the value thereof, and that a right of action by force of said statute has accrued to the plaintiff to recover the same of the defendant with cost, and to recover the same with costs the plaintiff brings this suit.

Then and there to answer unto A. B. of in an action brought on a certain statute law of this state, entitled an act concerning leather, and for regulating the several artificers concerned in working, or making up the same, who sues, and brings this action, as well in the name of the state of Connecticut, as in his own name, whereupon the plaintiff declares, and says, that in and by said statute among other things is enacted. [*recte second paragraph*] Now the plaintiff says, that the defendant disregarding the penalties of said statute, did on the day of in erect, set up, and make tan vats to tan in, and did carry on the trade, and mystery of tanning leather, and has ever since kept up said vats, and used said trade, and the plaintiff says, that the defendant has never applied to the court of common pleas in said county, and has never obtained any licence to set up, and manage the trade of tanning leather, which doings of the defendant are contrary to said statute, and the plaintiff says that he the defendant has forfeited the sum of twenty pounds lawful money, one moiety to the treasury of the county aforesaid, and the other moiety to the plaintiff, and that a right of action by force of said statute has accrued to him, to recover the same, for the uses aforesaid, and to recover the same with just cost, the plaintiff brings this suit.

ACTION on ORDER, or INLAND BILL, refused to be ACCEPTED.

In a plea of the case, whereupon the plaintiff declares and says, that on the day of the defendant was justly indebted to the plaintiff by book in the sum of ten pounds lawful money, and in consideration and satisfaction thereof the defendant made, executed and delivered to the plaintiff a certain writing or order in the words following. To A. B. for value received, pay C. D. ten pounds lawful money and charge to account of E. F. As by said order or writing ready in court to be produced appears, which order the plaintiff accepted in discharge of said debt, and on the day of offered and presented the same to said A. B. for acceptance and payment, and the said A. B. then refused to accept and pay the same of all which, the defendant afterwards on the day of had notice: and thereupon the plaintiff says, that the defendant by reason of the premises, became justly indebted to him in the sum of ten pounds lawful money, and being so indebted, he did in consideration thereof assume upon himself, and well and faithfully promise the plaintiff, to pay to him said sum of ten pounds lawful money, in a reasonable time when requested.

WARRANTY.

In a plea of the case whereupon the plaintiff declares and says, that on the day of he purchased of the defendant, a certain horse and paid him therefor, the valuable consideration of thirty pounds lawful money, and the plaintiff says, that at the time of the sale and delivery of said horse, the defendant did affirm, declare, and warrant to the plaintiff, that the same was sound, wind and limb, and free from any defect or disease whatever, and the plaintiff says that at the time of said sale, delivery and warranty of said horse, the same was disordered and defective, and for a long time before, and then had a certain incurable disease, called whereby said horse was rendered of no value, and the plaintiff has wholly lost the same: and the plaintiff says that the defendant has not kept his said warranty, but has broken the same, to his damage, &c.

FRAUD.

In a plea of the case, whereupon the plaintiff declares and says, that on the day of he purchased of the defendant a certain horse—and paid him therefor the valuable consideration of thirty pounds lawful money, and the

plaintiff says, that he purchased said horse as, and for a sound horse, and that the defendant at the time of said sale and delivery, did affirm and declare to the plaintiff, that said horse, was sound wind and limb, and free from any defect or disease whatever. And the plaintiff further says, that at the time of said sale and delivery, said horse was unsound, and then and for a long time before, had an incurable disease, called—which was then well known to the defendant, but wholly unknown to the plaintiff: and that said disease has rendered said horse of no value, and that the plaintiff has wholly lost the same, to his damage, &c.

AUDITA QUERELA.

To the honorable—Esquire, judge of the court of common pleas, in the county of A. B. of complaint makes, and gives your honour to understand, that B. D. of brought his action on the case against the complainant, before the court of common pleas, holden at on the day of demanding lawful money damages. At which court, the said C. D. recovered judgment against the complainant, for the sum of debt, and cost, and took out execution therefor, and on the day of the complainant paid to the said C. D. the full sum of said judgment and execution, and all cost; nevertheless the said C. D. immediately put said execution into the hands of the sheriff of said county, who now holds the same and threatens to levy the same upon the person or estate of the complainant: and the complainant has no day in court to plead the matters aforesaid, and is grievously injured in the premises, whereupon he prays that said execution may be stayed, and that the said C. D. may be summoned to appear before the next county court, to be holden at then and there to shew reason, if any he have, why he should not be stayed from proceeding any further with said execution, and that all proceedings on the same may be stayed till the same be determined. Dated, &c.

To the sheriff, &c. By authority of the state of Connecticut, you are hereby required to cause the said C. D. in the foregoing complaint, to know that he proceed no further with said execution in said complaint mentioned, but that he stay the same until the matter mentioned in said complaint shall be heard by said county court, according to the request of said complainant, and you are to summon the said C. D. to appear before the county court to be holden at then and there to answer to the matters contained in the said complaint, and to do and suffer what upon a hearing of said cause shall be adjudged by said court in the premises. Fail not &c.

WRIT of ERROR.

To appear before the honorable superior court to be holden then and there to hear read, the process, record and judgment of the court of common pleas holden at in an action wherein the said was plaintiff, and was defendant, and the errors therein assigned, and to do and suffer what by said superior court shall be enjoined in said cause. Whereupon the plaintiff in error declares and says, that the said brought forward to the court of common pleas, holden his action in the following manner, (*recite the whole process and proceedings in the action*) as by the files and records of said court of common pleas ready in court to be produced, fully appears. Now the plaintiff in error complains and says, that said court of common pleas in proceeding to, and rendering said final judgment, manifestly erred and mistook the law, and for cause of error especially assigns whereupon the plaintiff prays, that said erroneous judgment may be reversed and set aside, and he be restored to all that he has lost thereby, which is not less than lawful money, and to recover said damages and reverse said judgment, the plaintiff brings this suit. Fail not &c.

P L E A D I N G S.

CASE.

In a plea of the case whereupon the plaintiff declares and says, that the defendant, in and by a certain writing or note, under his hand, by him well executed

executed, dated the day of promised the plaintiff for value received to pay to him the sum of ten pounds lawful money, on demand with interest, as by said writing or note ready in court to be produced appears. And the plaintiff says that the defendant his promise aforesaid not regarding, hath never performed the same, tho often requested &c.

John Doe.

PLEA in BAR.

vs.

Richard Roe.

} Court of common pleas,—W.—county, Dec. term—
Action on case—

And now the defendant defends, pleads and says, that the plaintiff of having and maintaining his action, ought to be barred, because, he says tho true it is that he executed the note on which, &c. yet he further says, that on the day of he did offer and tender to the plaintiff, the sum of ten pounds lawful money, which was the full sum due on said note, in full payment thereof, which the plaintiff then refused to accept and receive, and still does refuse to receive the same, and the defendant says that he has always stood ready to pay said sum to the plaintiff, and yet is ready, and now offers and tenders the same in court; which the defendant is ready to prove, and thereof prays judgment.

REPLICATION.

The plaintiff replies to the plea in bar of the defendant, and says, that he ought not to be barred, any thing therein contained, notwithstanding, because he says, that tho true it is, that the defendant did, on said day offer and tender to the plaintiff said sum of ten pounds, in full payment of the note, on which, &c. and that the plaintiff refused to accept, and receive the same, yet he further says, that afterwards, on the day of he the plaintiff did make demand of the defendant of said sum of ten pounds due by the note, on which, &c. and tendered as aforesaid, which the defendant then refused and neglected to pay, which the plaintiff is ready to verify, and thereof prays judgment.

REJOINDER.

The defendant rejoins to the reply of the plaintiff, and says he ought not to be barred, because he says, tho true it is, that the plaintiff on said day of made demand of the sum due by the note on which &c. and tendered as aforesaid, yet he further says, that he did on said day of offer and tender to the plaintiff, said sum of ten pounds tendered as aforesaid, which he is ready to prove, without that, that the defendant then refused and neglected to pay to the plaintiff, said sum of ten pounds lawful money, due by the note on which &c. and tendered as aforesaid, in manner and form as the plaintiff in his reply hath alleged, and thereof prays judgment.

SURREJOINDER.

The plaintiff surrejoins to the rejoinder of the defendant, and says, he ought not to be barred, because he says, that on the day of he did make demand of the defendant, of the sum due by note on which &c. and tendered as aforesaid, which the defendant then refused and neglected to pay, in manner and form as the plaintiff in his reply has alleged, and thereof puts himself on the country.

REBUTTER.

And the plaintiff likewise.

JUDGMENT.

At a court of common pleas holden at—

John Doe, of ——— Plaintiff.

Richard Doe, of ——— Defendant.

In a plea of the case on note, demanding lawful money, damages, with cost of suit, as per writ on file dated This action was brought to and by legal removes, comes to this term. Now the parties appeared, and are at issue, as on file. The case with the evidences, being committed to the jury, they brought in the following verdict, viz. “ In this case the jury find,

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that

" that the plaintiff on the day of did make demand of the defendant
 " of the sum due by the note on which &c. and tendered as aforesaid, which
 " the defendant neglected and refused to pay, in manner and form as the
 " plaintiff in his reply and rejoinder has alledged, and therefore find for the
 " plaintiff to recover of the defendant damages together with his cost."
 This court accept the verdict of the jury, and thereupon consider that the
 plaintiff recover of the defendant lawful money damages, and his cost of
 suit taxed at

INFORMATION by GRANDJURORS.

BREACH of PEACE.

To A. B. justice of the peace for the county of C. comes E. F. of G. a
 grandjuror in said town of G—and to your worship on oath complains and
 informs, that H. I. of said G—did at or about with force and arms,
 an assault make upon the body of K. L. of and did him, beat and strike
 many blows, by which he was greatly hurt and wounded, which doings of
 the said H. I. are against the peace, and contrary to the statute, in such case
 made and provided. E. F. Grandjuror.

WARRANT.

To the sheriff, &c. By authority of the State of Connecticut you are hereby
 commanded forthwith to arrest the body of H. I. of and him bring be-
 fore me the subscriber a justice of the peace for the county of at then
 and there to answer unto the matters contained in the foregoing complaint
 of E. F. grandjuror, and thereon be dealt with according to law. Fail not
 &c.

THEFT.

—Complains and informs, that A. B. of did in on the day of
 feloniously take, steal, and carry away a certain (*describe the thing stolen*) of
 the price and value of the proper estate of E. F. which doings of the
 said A. B. are against the peace and contrary to the statute in such case made
 and provided.

PETITION in EQUITY.

To the honorable superior court of the State of Connecticut, to be holden
 at The petition of A. B. of C—humbly sheweth (*state all the material cir-
 cumstances of the claims or matters in dispute.*) and your petitioner says, that he
 is wholly without remedy at law, and must forever lose said just debt, or claim,
 unless relieved by the interposition of your honours, as a court of equity:
 your petitioner therefore prays your honours to take his case into considera-
 tion, and enquire into the truth of the aforesaid facts, either by yourselves, or
 by a committee, and on their being found true, to order and decree (*state
 the specific relief desired,*) or that your honours would in some other way, grant
 such relief, as to your honours shall seem just and reasonable, and your peti-
 tioner as in duty bound shall ever pray. Dated, &c.

SUMMONS. 22 JU 59

To the sheriff, &c. By authority of the State of Connecticut, you are hereby
 commanded to summon and give notice to D. E. of F—to appear (if he see
 cause) before the superior court to be holden at then and there to shew rea-
 sons (if any he have) why the prayer of the foregoing petition of A. B.
 of C—should not be granted. Fail not &c.

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